Supreme Court, U.S.
FILED

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IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1994

NICHOLAS W. DICUCCIO, M.D.,

*Petitioner,*

v.

GEISINGER CLINIC, A PENNSYLVANIA
NON-PROFIT CORPORATION,

*Respondent.*

**PETITION FOR A WRIT OF CERTIORARI TO SUPERIOR COURT OF PENNSYLVANIA**

# PETITION FOR WRIT OF CERTIORARI

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**PETITION FOR A WRIT OF CERTIORARI TO
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Petitioner herein respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Superior Court of Pennsylvania entered in this action on April 3, 1992. Application for Reconsideration of Denial of Petition for Allowance of Appeal to the Supreme Court of Pennsylvania was denied on August 31, 1994.

## OPINIONS BELOW

The decision of the Superior Court of Pennsylvania is reported at 606 A.2d 509 (Pa. Superior Ct.1992) and 414 Pa. Super 85 and is reprinted in the attached appendix. (Appendix,1-44).

The Opinion and Order of the Court of Common Pleas of Clinton County, Pennsylvania is reprinted in the appendix. (Appendix, 45-65). The accompanying order of October 3, 1990 is reprinted in the Appendix. (Appendix, 66).

The decisions of the Supreme Court of Pennsylvania denying Petition for Allowance of Appeal and Denying Application for Reconsideration are contained in the Appendix. (Appendix, 71 and 73).

## BASIS FOR JURISDICTION

The Final Judgment of the Superior Court of Pennsylvania was entered on April 3, 1992. Petition for Allowance of Appeal with the Supreme Court of Pennsylvania was denied November 18, 1993. Petition for Reconsideration was denied August 31, 1994. This

Court has jurisdiction to review the judgment of the Superior Court of Pennsylvania pursuant to 28 U.S.C. § 1257.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Article I, § 8, clause 3.

United States Constitution, Amendment VII.

United States Constitution, Amendment XIV, § 1.

Pennsylvania Constitution, Article I, § 6.

Pennsylvania Consolidated Statutes Annotated, Title 42, § 7533.

Pennsylvania Rule of Civil Procedure 1033.[1]

## STATEMENT OF THE CASE

This case arises out of a dispute between the petitioner, Nicholas W. DiCuccio, M.D. and the respondent, Geisinger Clinic, regarding two documents, one entitled "Asset Purchase Agreement" and the other entitled "Employment Contract". Petitioner, DiCuccio, is a

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[1] The text of these provisions appears in the appendix at page 75.

general surgeon, practicing in Lock Haven, Pennsylvania since 1973. In 1975, he became a member and shareholder of the Clinton Association of Physicians and Surgeons ("CAPS").

Respondent, Geisinger, is one of the largest health care providers and health maintenance organizations in the United States. In 1986, an agreement was ultimately reached for Geisinger to purchase CAPS's assets and goodwill. Geisinger negotiated an Asset Purchase Agreement ("Asset Agreement") which required, as a condition precedent to the closing of the sale, each of the CAPS physicians execute an Employment Agreement with Geisinger. (Appendix 103-104).

The Employment Agreement contained a restrictive covenant and a liquidated damages clause. The restrictive covenant provided that if the physician would terminate his employment, he would not practice medicine within fifty miles of the medical office for a period of two years. The covenant could be waived if the physician paid the greater of One Hundred Sixty-

Five Thousand Dollars or his total compensation for the preceding year. As a further consequence, if employment was terminated before Geisinger completed the purchase, the physician was required to forfeit all remaining installment payments. Geisinger would retain these sums. (Appendix 107-108). A similar restrictive covenant and waiver payment were signed by over 180 physicians as a routine part of recruiting physicians to the Geisinger Clinic. (Record 496a).

DiCuccio left Geisinger on February 28, 1990. Subsequently, he established an office for the practice of medicine in Lock Haven Hospital. Lock Haven Hospital is a Critical Access Hospital for Rural Care as designated by the Federal Government. Dr. DiCuccio provides medical care for approximately 5,000 patients in a county with a population of 37,000. (Appendix 154-155).

Geisinger filed a Complaint in Equity alleging that Dr. DiCuccio breached portions of an employment agreement and moved for a Declaratory Judgment, or

alternatively, injunctive relief in the Court of Common Pleas of Clinton County. (Appendix 79).

Dr. DiCuccio filed an Answer denying that any agreement existed, or alternatively that he breached the agreement. Dr. DiCuccio also averred that the agreement between the parties was not a valid contract because the liquidated damage clause was a penalty and also the contract lacked mutual consideration.

The Pennsylvania Court of Common Pleas ordered that Geisinger's motion for Declaratory Judgment be heard. Petitioner proceeded with the hearing based upon the belief that both attorneys to the case and the trial court judge, Charles F. Greevy, agreed that the validity of the contract was first to be determined. If the contract was held to be valid, Dr. DiCuccio would then be given leave by the court to file an Answer and Counterclaim regarding the legal issue of damages. (Record, 323a). The Counterclaim was to include setoffs that Dr. DiCuccio was owed by Geisinger.

In May and June 1990, the Motion for Declaratory Judgment was heard. On October 3, 1990, Geisinger's Motion for Declaratory Judgment was granted. Dr. DiCuccio then filed Exceptions to the ruling of the trial court which were overruled. On April 1, 1991, the trial court entered final judgment for Geisinger Clinic for $194,166.62, plus interest.

On April 18, 1991, Dr. DiCuccio filed a Motion for Rehearing asking the trial court to amend the Order to allow Dr. DiCuccio to file an amended Answer and Counterclaim on the issue of damages. On May 31, 1991, the trial court heard the Motion for Rehearing to Amend the Judgment. During the hearing, Counsel for Petitioner made the following argument:

> So, to sum up a lot of procedure, what it really boils down to is our position in this case isn't over yet. Even though the court made a finding on behalf of the plaintiff on the declaratory judgement [sic] aspect, we are entitled to present our evidence on set-offs and counterclaim to a jury for determination, if they are valid, and if so in what amount. That meant some [sic] then would be the judgment either for plaintiff or defendant." (p. 6-7 of May 31, 1991 hearing).

Further, counsel for Petitioner stated that it was Petitioner's position that the drafting and the enforcement of a restrictive covenant was opposed to both state and federal law dealing with restraint of trade and that it is not appropriate to restrain a profession. (p. 8-9 of May 31, 1991 hearing). The trial court denied the Motion on May 31, 1991.

On April 24, 1991, Dr. DiCuccio filed an appeal with the Superior Court of Pennsylvania. Dr. DiCuccio stated in his appellate brief that he was being denied his right to a jury by having a judgment entered before he could present evidence on damages. (Brief of Appellant, p. 20-23).

On April 3, 1992, the appellate court ruled in favor of Geisinger. The court found that the employment agreement was a valid contract, and that the liquidated damage clause was not a penalty. The court also found that Dr. DiCuccio had not reserved his right to file a Counterclaim for set-offs before the trial court entered

final judgment. The appellate court reasoned that the Declaratory Judgment was an action in equity and any Counterclaim would also be in equity. (Appendix 42-44). The Court ignored the fact that the original Complaint also stated legal claims.

Dr. DiCuccio then appealed to the Supreme Court of Pennsylvania. On November 13, 1993, the court denied the allowance of appeal *per curiam*. The Court also denied a Motion for Reconsideration on September 2, 1994.

## REASONS FOR GRANTING THE WRIT

### I. THIS CASE PRESENTS THE QUESTION OF WHETHER ARBITRARILY DENYING A PARTY THE RIGHT TO PRESENT EVIDENCE BEFORE A JURY ON THE LEGAL ISSUE OF DAMAGES BEFORE A JUDGMENT IS ENTERED IS A DENIAL OF PROCEDURAL DUE PROCESS.

In the present case, Petitioner, Nicholas W. DiCuccio, M.D. was denied a right to assert counterclaims, and thus present evidence before a jury of setoffs against a liquidated damage clause. The question presented is whether a trial court violates the Due

Process clause of the Fourteenth Amendment by entering a final judgment without allowing a party to assert valid counterclaims and present evidence of damages before a jury.

The right to due process includes notice and the right to a hearing. "The right to be heard must necessarily [also] embody a right to file motions and pleadings essential to present claims and raise relevant issues." Holt v. Virginia, 381 U.S. 131, 136 (1964). A party must be allowed to present evidence before a case is decided on the merits. Without notice, the right to a hearing is meaningless because a party will not have warning to prepare its case.

Procedural due process involves a two part question. Is due process required, and if so, what process is due? The first question can be assumed in this case because a hearing took place to decide the rights between parties. In any state procedure, minimum due process is always required.

The question of what process is due has never been an exact one. As Justice Jackson stated:

> "Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306, 313 (1950).

Further, the right to a jury trial is of constitutional origin. U.S. Const. Amend. VII, Pa. Const. Art. 1, § 6. It is preserved as the right existed at the time of the common law. The phrase, "suits at common law", has been interpreted to refer to cases in law courts as opposed to courts in equity or admiralty courts. Atlas Roofing v. Occupational Safety Comm'n, 430 U.S. 442, 449 (1976). A suit for a money judgment has historically been considered a suit at common law. Whitehead v. Shattuck, 138 U.S. 146, 151 (1891).

Thus, in the case at hand, due process required that Petitioner be permitted to assert counterclaims for money damages before a jury prior to the entry of a final

judgment. This is the opportunity for hearing appropriate to the nature of the case which Petitioner was denied.

In its Complaint, Geisinger filed legal and equitable claims against Dr. DiCuccio which all related to the "agreements" between the parties. These claims included the declaratory judgment, which was heard by the trial court, and alternatively, injunctive relief. In addition, the Complaint included legal claims for breach of contract, tortious interference with contractual relations, and unfair competition. (Appendix 79). In these claims, Geisinger asked for both compensatory and punitive damages. These counts were legal claims for money damages, and thus Petitioner was entitled to a jury trial on these issues and the issue of any setoffs.

The agreement between the parties and the Court in this case was for the validity of the contract to be determined in the Declaratory Judgment hearing. Dr. DiCuccio was then to be given leave of court to file an Answer and Counterclaim on the issue of damages.

(Record, 323a). Reliance upon this agreement was the sole reason that Dr. DiCuccio did not assert the counterclaim at the beginning of this case. The contract, including the liquidated damage clause was found to be valid. Without any notice to Dr. DiCuccio, a final judgment for damages was thereafter entered. After the judgment was entered against Dr. DiCuccio, Geisinger dismissed the remainder of its complaint. If Dr. DiCuccio had known that he would be precluded from asserting his Counterclaim after the court decided the validity of the contract, he would have asserted his claim much earlier. By dismissing these legal claims, Geisinger avoided a jury trial on what can only be characterized as a legal claim for damages in the original complaint and could force Dr. DiCuccio to pay a judgment before being allowed to present his evidence in court.

Dr. DiCuccio was denied the right to assert setoffs and present evidence of money damages before a jury as guaranteed by Article I, § 6 of the Pennsylvania

Constitution. The appellate court characterized the case as one in equity. In doing so, the court ignored the fact that the original complaint, as Dr. DiCuccio has asserted from the beginning, is a legal claim for damages. (Record, 324a) Clearly, the point of a counterclaim is to decide resolve all disputes amongst the parties in one suit. Clearly, Petitioner was entitled to a jury trial on the issue of money damages. By denying a party the right to established State adjudicatory procedures, the action of the trial court was "equivalent of denying them an opportunity to be heard upon their claimed right[s]." Boddie v. Connecticut, 401 U.S. 371, 380 (1971).

At the May 31, 1991 rehearing, Dr. DiCuccio again asked any final judgment be made subject to the legal counterclaims that Dr. DiCuccio was entitled to assert. Pennsylvania Rule of Civil Procedure 1033 entitles a party to leave of court to amend the pleadings at any time in proceedings, including after judgment has been entered.

Counsel for Geisinger admitted that damages were not to be settled until after the hearing on the Declaratory Judgment. Toward the end of the trial, counsel stated that precise damages did not yet have to be proven. (Record, 638a). Despite this, the court entered final judgment without allowing Dr. DiCuccio to present evidence, and then refused to amend the judgment at the May 31, 1991 hearing.

The Superior Court of Pennsylvania mischaracterized the nature of the proceedings to conclude that Dr. DiCuccio had no right to file a counterclaim. First, the appellate court stated that Dr. DiCuccio never explained what the Counterclaim would include to setoff against the judgment. In fact, at the hearing on May 31, 1991, counsel for Dr. DiCuccio gave specific reasons for filing the Counterclaim. (p. 8-9 of May 31, 1991 hearing). Dr. DiCuccio was never paid certain incentives on his salary. Many of the calculations on his incentives were not correct. Secondly, the

appellate court states that Dr. DiCuccio was not precluded from filing a counterclaim. This reasoning refuses to recognize that Dr. DiCuccio did not assert his right to a Counterclaim because of the agreement between the parties and the trial court and thus, Petitioner was denied his right to due process and a jury trial on the issue of money damages.

The present case is similar to a case decided by this Court in 1982. See Logan v. Zimmerman Bruch Co., 455 U.S. 422 (1982). In Logan, the plaintiff-appellant brought a charge of unlawful conduct before the Illinois Fair Employment Practices Commission (Commission) alleging that defendant-appellee had discriminated against him on the basis of physical handicap unrelated to ability. The Illinois Fair Employment Practices Act (Act) set forth a scheme for adjudicating allegations of discrimination, requiring the Commission to convene a factfinding conference within 120 days after the filing of the charge.

The Commission scheduled the factfinding

conference for 125 days after the charge was filed. At the conference, the defendant-appellee moved that the charge be dismissed because the Commission failed to hold the conference within the 120-day period. This request was rejected and defendant-appellee petitioned the Supreme Court of Illinois for an original writ of prohibition. The Illinois court found that the legislative language was mandatory and the Commission did not have jurisdiction to consider the charge, rejecting plaintiff-appellant's argument that his due process and equal protection rights would be violated were the Commission's error allowed to extinguish his cause of action.

This Court engaged in the familiar two-party inquiry: whether plaintiff-appellant was deprived of a protected interest and, if so, what process was his due. The first part of the inquiry was answered in the affirmative, relying on Mullane. This Court stated that a cause of action is a species of property protected by the

Fourteenth Amendment's Due Process Clause, which has been interpreted as preventing the States from denying potential litigants use of established adjudicatory procedures, when such an action would be the equivalent of denying them an opportunity to be heard upon their claimed rights.

This Court then considered the second part of the inquiry-what process is due. At a minimum, the Due Process Clause grants the aggrieved party the opportunity to present his case and have its merits fairly judged. The timing and nature of the required hearing will depend on appropriate accommodation of the competing interests involved. These include the importance of the private interest and the length or finality of the deprivation; the likelihood of governmental error; and the magnitude of the governmental interests involved. This Court then determined that each of these factors led them to conclude that the plaintiff-appellant was entitled to have the Commission consider the merits

of his charge before deciding whether to terminate his claim. Plaintiff-appellant's interest in retaining his employment and in redressing an instance of alleged discrimination are all substantial. The deprivation was final and the State's interest in refusing plaintiff-appellant's procedural request was insubstantial.

In the present case, Petitioner has a substantial property interest in any causes of action he has against the Respondent and is guaranteed, a jury trial to determine damages by the Pennsylvania Constitution. By reliance upon the Trial Court's statement that he would be able to assert counterclaims and set-offs prior to the entry of a final monetary judgment, he has been finally deprived of any ability to reduce the sum owed under the liquidated damages clause of the contract by presenting evidence before a jury in the same proceeding. The Pennsylvania Court will not be unduly burdened in being required to try Petitioner's claims. This is the purpose for which the Court exists. The Fourteenth Amendment

requires that Petitioner be given an opportunity at a meaningful time and in a meaningful manner for a hearing appropriate to the nature of the case. Petitioner was denied that opportunity in the present case because the Trial Court entered a judgment for a substantial amount of damages without giving him an opportunity, as he requested and was entitled, to present any evidence before a jury. This was a clear infringement upon Petitioner's due process rights.

The Declaratory Judgment Action was to determine the validity of the employment agreement between the parties. See 42 Pa C.S.A. § 7531 *et seq.* Instead, Geisinger received a final judgment on damages, without ever having to face a jury. Dr. DiCuccio had a right to request a jury trial before a final money judgment for damages was entered. Petitioner relied upon the agreement of the parties and the Trial Court and did not file any counterclaims, just as the plaintiff-appellant in Logan relied upon the commission to protect his rights.

The refusal to allow a jury to decide the issue of damages was a clear infringement on the right of Dr. DiCuccio to due process and to a jury trial.

## II. THE DECISION OF THE PENNSYLVANIA SUPERIOR COURT ENFORCING THE NON-COMPETITION CLAUSE IN THE EMPLOYMENT AGREEMENT OF PETITIONER, VIOLATES THE COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION.

The Pennsylvania Court's decision in this case places and impermissible burden on Interstate Commerce in violation of the Commerce Clause, Article I, §VIII, C. 3 of the U.S. Constitution, by enforcing the non-competition agreement in the employment contract between Petitioner, Dr. Nicholas DiCuccio, and Geisinger Clinic. The issue presented in this case is whether the enforcement of a restrictive covenant contained in a physician's employment contract who practices medicine in a "critical access area" violates the Commerce Clause of the United States Constitution?

The general rule with respect to state regulation of Interstate Commerce is that:

> "the states have not been deemed to have authority to impede . . . the free flow of commerce from state to state, or to regulate those phases of the national commerce which, because of the need of national uniformity, demand that their regulation, if any, be prescribed by a single authority." Southern Pacific Co. v. Arizona, 325 U.S. 761, 767 (1945).

In Southern Pacific Co., the Court held that an Arizona statute making it unlawful to operate a passenger train with more than fourteen cars or a freight train with more than seventy cars on Arizona tracks contravened the Commerce Clause of the Federal Constitution. Southern Pacific Co., 325 U. S. at 781-784. In reaching its decision, the Court stated:

> For a hundred years it has been accepted constitutional doctrine that the commerce clause, without the aid of Congressional legislation, thus affords some protection from state regulation inimical to the national commerce, and that in such cases, where Congress has not acted, this Court, and not the state legislature, is under the commerce clause the final arbiter of the competing demands of the state and national interests. Southern Pacific Co., 325 U.S. at 769.

The Court then considered the extent to which the Arizona regulation burdens interstate commerce.

Southern Pacific Co., 325 U.S. at 771-775. The Court found that the operation of trains longer than those permitted by the Arizona statute was standard practice over the major U.S. railroad lines and that there was a need for national uniformity in the railway system in order to promote economics and efficiency. Southern Pacific Co., 325 U.S. at 771. Based on these findings the Court concluded that the Arizona law "materially impede[d] . . . the movement of appellant's trains through the state and interpose[d]. . .a substantial obstruction to the national policy proclaimed by Congress to promote an economic and efficient railway system." Southern Pacific Co., 325 U.S. at 773.

At first glance, this case appears to be one in which a state court is construing a contract between two parties. However, the Pennsylvania Court's decision is the equivalent of state regulation. See Shelley v. Kraemer, 334 U.S.1 (1948). The decision is a direct infringement upon Article I, §8, Clause 3 of the United

Stated Constitution. In addition to restraining Dr. DiCuccio from practicing, the State of Pennsylvania has set a precedent for the enforcement of one hundred eighty (180) additional restrictive covenants in the contracts of other Geisinger Clinic employees which will further restrict the ability of physicians to provide medical services in "critical access areas". (Record, 496a).

As a general rule, restrictive covenants in employment contracts are disfavored. In fact, the Pennsylvania Rule of Professional Conduct 5.6(a) states that "a lawyer shall not participate in offering or making a partnership or employment agreement that restricts the rights of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement." The comment to Rule 5.6 specifically states that "an agreement restricting the right of partners or associates to practice after leaving a firm not only limits their professional autonomy but also limits the freedom of clients to choose a lawyer."

Further, restrictive covenants in the employment contracts of physicians are particularly disfavored in jurisdictions where there is a shortage of physicians. New Castle Orthopedic Associates v. Burns, 392 A.2d 1383 (Pa. Superior Ct. 1978); Dick v. Giest, 693 P.2d 1133 (Idaho Ct. App. 1985); Iredell Digestive Dis. C. v. Petrozza, 373 S.E.2d 449 (N.C. Ct. App. 1988). In New Castle, the Pennsylvania Supreme Court held that the plaintiff was not entitled to a preliminary injunction in an action to enforce a restrictive covenant where there was a shortage of physicians in the area. The Court recognized the national policy of providing adequate health care to all citizens stating:

> In an era where the availability of and the rising cost of medical services are matters of national concern, the law must consider the impact of the enforcement of these non-competitive clauses upon the problem. Paramount to the respective rights of the parties to the covenant must be its effect upon the consumer who is in need of the service. This is of particular significance where equitable relief is being sought and the result of such an order or decree would deprive the community involved of a desperately needed service.

Clearly, the policy set forth by the state of Pennsylvania and other states is that restrictive covenants are not favored in employment contracts of professionals. The first and foremost concern of a physician is the treatment of his patients. Physicians have a duty to treat patients in an emergency situation without regard to the financial status of the patient. In this respect, physicians differ from the ordinary businessman whose objective is to generate profits.

The effect of the court's decision in this case is to treat a profession as if it were an ordinary business. The decision does not take into consideration that Dr. DiCuccio and other physicians have undertaken an oath to provide medical care and treatment to those individuals who are in need. If restrictive covenants in the employment contracts of physicians are enforced, then the physicians are prevented from fulfilling their duties to their patients because the financial impact of the restrictive covenants impedes the physician ability to

practice medicine. Further, the inability to practice medicine affects those who are associated with physicians in the stream of interstate commerce. As such, restrictive covenants in physicians' employment contracts are void as against public policy.

Specifically, the Pennsylvania Court's decision affects the ability of persons with Federally funded medicare benefits to obtain a physician in the Lock Haven area. Since there is a shortage of physicians in Lock Haven, the exclusion of Dr. DiCuccio from practicing medicine will hinder the Federal Government's efforts to administrator medicare in a uniform manner. Moreover, the precedent stated by the Pennsylvania Court will lead to the exclusion of many other physicians in "critical access areas" and, as a result, will further hinder the Federal Government's effort to implement medicare services.

Further, Dr. DiCuccio purchases supplies and equipment from companies outside the State of

Pennsylvania and receives revenues from out of state insurance companies and the Federal Government. In Weiss v. York Hospital, 745 F. 2d 786 (3d Cir., 1984), cert. denied, 470 U.S. 1060 (1985), the Court of Appeals upheld the District Court's finding that the purchase of drugs and equipment in interstate commerce and the acceptance of payments from private insurance companies and Federal and State insurers, may locate outside of Pennsylvania, was sufficient to show a substantial affect on interstate Commerce under § 1 of the Sherman Antitrust Act. Thus, in this case, preventing Dr. DiCuccio from practicing medicine, which will be the effect of the enforcement of the restrictive covenant and waiver payment, will both eliminate his need to purchase supplies and end his insurance revenue, and, as a result, will have a substantial adverse affect on the stream of interstate commerce. Weiss, 745 F. 2d at 824-825.

Finally, prohibiting Dr. DiCuccio from practicing

medicine in Lock Haven will limit Lock Haven's ability to serve and care for the needs of non-resident patients. Dr. DiCuccio is a general surgeon who practices in a very small rural area. Out of the 700 to 800 patients he services each month, some of the patients are non-residents. Eliminating a physician in an area where there is a recognized shortage of physicians will only amplify Lock Haven's ability to provide quality services to non-resident citizens while passing through the state of Pennsylvania. See Fuentes v. South Hills Cardiology, 946 F.2d 196, 200 (3d Cir., 1991).

A review of the foregoing factors unequivocally establishes that the Court's decision impermissibly violates Article I §8 Clause 3 of the United States Constitution. In addition, the Court's precedent in enforcing the restrictive covenant in Dr. DiCuccio's Employment Contract will create a domino effect enforcing numerous similar restrictive covenants in the Midwest which will further hinder the Federal

governments policy to administer health care benefits in a uniform manner. Based on the foregoing facts, the record is clear that Pennsylvania's action places an impermissible burden on Interstate Commerce in violation of the Commerce Clause.

## CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted.

Respectfully submitted,

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| GEISINGER CLINIC, A PENNSYLVANIA NON-PROFIT CORPORATION, | : | IN THE SUPERIOR COURT OF PENNSYLVANIA |
| v. | : | Harrisburg Office |
| NICHOLAS W. DICUCCIO, M.D., | : | No. 00253 Harrisburg, 1991 |
| Appellant. | : | |

Appeal from the Order of the Court of Common Pleas, Clinton County, Civil Division, at No. 6-90 (EQUITY).

BEFORE: OLSZEWSKI, HUDOCK and BROSKY, JJ.

OPINION BY BROSKY, J. FILED: April 3, 1992

This is an appeal from an Order entering a declaratory judgment in favor of Geisinger Clinic (Geisinger) and against Nicholas W. Di Cuccio, M.D., (Dr. Di Cuccio) appellant herein.

Dr. Di Cuccio raises for our consideration four issues: (1) The employment agreement is invalid because its terms are ambiguous and illusory, and, consequently, the restrictive covenant ancillary to the

agreement is unenforceable; (2) The liquidated damages clause is an unconscionable forfeiture which renders it an invalid, unenforceable penalty clause; (3) The two year limitation of the restrictive covenant clause has expired because the terms thereof had begun to run at the time of the sale of the business; and (4) The trial court erred in awarding monetary damages without permitting Dr. Di Cuccio to file an answer and counterclaim to the complaint, thereby usurping Dr. Di Cuccio's right to a jury trial on his counterclaim to allow a set off on the amount of liquidated damages. We affirm.

We adopt the factual findings of the trial court as set forth in its Opinion of October 3, 1990. See 1 - 7.

Dr. Di Cuccio, together with the other physician/stockholders in the Clinton Association of Physicians and Surgeons, P. C. (CAPS) and Geisinger entered into a bilateral contract for the purchase of the assets of CAPS by Geisinger, the employment contract at issue here being ancillary to and a condition of the asset

purchase agreement. See Opinion, 1, 2; Findings of Fact Nos. 3-5, 8. A bilateral contract is formed when one party to the contract promises to perform or to forebear from performing in exchange for the promised performance or forbearance of the other contracting party. Greene v. Oliver Realty Co., 363 Pa. Super. 534, 526 A.2d 1192 (1987), appeal denied, 517 Pa. 607, 536 A.2d 1331 1988).

As his first issue, Dr. Di Cuccio attacks the allegedly illusory provisions of Exhibit A of the ancillary employment agreement, relating to salary and additional compensation, in that the nature and extent of Geisinger's obligation in this regard are uncertain and amount, in effect, to no obligation on the part of Geisinger. Our reading of Exhibit A is not in accord with the interpretation proffered by Dr. Di Cuccio. Exhibit A of the employment agreement provides for an initial annual base salary of one hundred sixty-five thousand dollars, not to be reduced during the term of the

agreement, provided that (1) Dr. Di Cuccio remain financially productive at the level as existed prior to the execution of the agreement; and (2) Geisinger's net revenues over its expenses for the fiscal year immediately preceding do not fall below eight percent of net revenues budgeted for CAPS. Moreover, additional compensation for Dr. Di Cuccio was provided for in Exhibit A in three respects:

(A) Percentage of Net Revenue. Dr. Di Cuccio is entitled to a percentage of net revenue in excess of his base salary, above, if the aggregate collected net revenues of Dr. Di Cuccio and three other physicians who were also parties to the agreement exceeds their aggregate base salary by a specific percentage to be annually reviewed and adjusted, if necessary.

(B) Medical Director's Fund. Dr. Di Cuccio would also be entitled to an annual discretionary bonus from a fund comprised of one percent of the net revenue. This discretionary bonus was to be awarded by the Medical

Director of Geisinger to recognize non-income generating contributions by physicians of CAPS.

(C) Group Bonus. Dr. Di Cuccio would also receive a bonus in the amount of up to forty percent of CAPS' net revenues in excess of the budget if the expenses were at or below the budget and the income goals set forth in Exhibit A (relating to basic salary).

A contract is evidenced by a mutuality of obligation. A mutuality of obligation exists when both parties to the contract are required to perform their respective promises. If a mutuality of promises is absent, the contract is unenforceable. Id. A promise to perform or to forebear from performing must be supported by consideration. Id. If the promise is entirely optional with the promisor, it is said to be illusory and, therefore, lacking consideration and unenforceable. Best v. Realty Management Corp., 174 Pa. Super. 326, 101 A.2d 438 (1953); J. D. Calamari & J. M. Perillo, The Law of Contracts §4-17 (2nd ed. 1977). The promisor has

committed him/herself to nothing. J. D. Calamari, supra; E. A. Farnsworth, Contracts §2.13 (1982).

Dr. Di Cuccio argues that the additional compensation provisions of Exhibit A are illusory because the amounts of additional compensation are unascertainable. Dr. Di Cuccio maintains that under the additional compensation provisions of Exhibit A, Geisinger was not bound to pay any compensation to him beyond the one hundred sixty-five thousand dollar annual basic salary because the terms in which these additional compensation provisions are cast are illusory, they are optional with Geisinger and lack a return promise in exchange for the promise of Dr. Di Cuccio to render medical services to patients who come to Geisinger. A contract is enforceable when the parties thereto have reached a mutual understanding, have exchanged consideration and have delineated the terms of their bargain with sufficient clarity. Greene v. Oliver Realty, Inc., supra. An agreement is sufficiently definite if the

parties intended to contract with each other and if a reasonably certain basis exists upon which a court could grant an appropriate remedy. Id.

The terms of the discretionary bonus provisions, we find, are sufficiently definite to withstand a claim of illusoriness or indefiniteness. Each additional compensation provision of Exhibit A states with sufficient clarity that it is discretionary. With respect to the basic salary provision, Geisinger promises to pay an annual salary in the amount of one hundred sixty-five thousand dollars which Geisinger promises not to reduce in exchange for the CAPS physicians' promise to maintain certain levels of financial productivity and patient accessibility, provided that net revenues for the previous fiscal year do not fall below eight percent of budgeted net revenues after June 30, 1987.

Clause A, relating to the percentage of net revenue additional compensation provides that aggregated revenues must exceed the aggregate base

salaries of the CAPS physicians by a certain percentage, which percentage is subject to annual review and adjustment. At the time of the execution of the asset purchase and employment agreements, the percentage was set out in the latter as forty-four point five percent. Therefore, Geisinger does promise the CAPS physicians a percentage net revenue bonus in exchange for the physicians' promise to provide medical care for Geisinger's patients. Clause B provides for a one percent annual allocation by the Medical Director, at his discretion, to award a bonus for non-revenue generating contributions. Therefore, Geisinger also promises to award a bonus to group member physicians for any non-revenue generating contribution to Geisinger in exchange for the physicians' promise to treat Geisinger's patient. Clause C allows for a bonus to the CAPS physicians in an amount up to forty percent of its net revenues in excess of the budget if expenses are maintained at or below budget levels and if income goals are attained. Should

expenses be kept at or below budget level, Geisinger promises the CAPS physicians a bonus for a certain percentage figure in exchange for the physicians' promise to keep expenses at least at the budget level and to attain specific income goals.

In sum, each of the above provisions spells out with definiteness and clarity the responsibilities, duties and expectations of all the parties to the agreement. Geisinger is bound by its promise to pay certain salaries and bonuses once certain net revenue levels have been attained and so long as the CAPS physicians maintain a certain degree of professional responsibility to Geisinger. We see nothing illusory, indefinite or one-sided about this arrangement. Moreover, the record indicates that the employment agreement and its Exhibit A were a product of arms-length bargaining between knowing, willing and sophisticated business people. This is especially pointed up by the fact that Dr. Di Cuccio personally received the sum of five hundred twenty thousand four hundred forty-

six dollars and fifty-seven cents, ($520,446.57), plus interest from Geisinger on the purchase price of CAPS. Finding of Fact No. 4. Therefore, Dr. Di Cuccio is bound by the terms of this agreement. Boyce v. Smith-Edwards-Dunlap Co., 398 Pa. Super. 345, 580 A.2d 1382 (1990). Since we are unable to conclude that the employment agreement fails for indefiniteness or was cast in illusory terms, we are similarly unable to find that the restrictive covenant provision of the employment agreement was unenforceable. We note that Geisinger's employment of Dr. Di Cuccio would constitute consideration for the latter's acceptance of the terms of the employment contract and, in particular, of the covenant not to compete in any event.. Morgan's Home Equipment Corp. v. Martucci, 390 Pa. 618, 136 A.2d 838 (1953). See also Records Center, Inc. v. Comprehensive Management, Inc., 367 Pa. Super. 79, 525 A.2d 433 (1987), and Barb-Lee Mobile Frame Co. v. Hoot, 416 Pa. 222, 206 A.2d 59 (1965).

We will next move to Dr. Di Cuccio's third issue in which he maintains that the two-year limitation of the restrictive covenant began to run at the time of the execution of the asset purchase and employment agreements and has, therefore, terminated.

Under the terms of the asset purchase agreement, Dr. Di Cuccio, together with the other CAPS physicians, was required to enter into an employment agreement with Geisinger. Finding of Fact No. 8. The latter agreement was ancillary to the former and included a clause of non-competition. Both agreements were executed by Dr. Di Cuccio on May 2, 1986. On January 23, 1990, Dr. Di Cuccio informed Geisinger that he would be terminating his employment with the latter on February 28, 1990. Finding of Fact No. 13. Dr. Di Cuccio subsequently began to practice medicine within a few miles of Geisinger, taking with him three other employees. Before he left Geisinger, Dr. Di Cuccio informed his patients that he would be taking care of

them at his new location. Since that time, patients whom Dr. Di Cuccio had formerly treated at Geisinger were receiving medical care from Dr. Di Cuccio at his new office. Findings of Fact Nos. 17, 18, 19.

The non-competition clause of the employment agreement between Dr. Di Cuccio and Geisinger reads as follows:

> 8. NONCOMPETITION
>
> (a) It is understood and agreed that Physician shall not, following termination of employment, directly or indirectly, enter into the practice of medicine. . .within the restricted area described by a radius of fifty (50) miles from such medical office facility designated as the principal site of physician's medical office at the time of such termination. This restriction shall endure for a period of two years from the date of termination of this Agreement and regardless of the grounds, if any, therefor. It is understood that this restriction is necessitated in part because of the time, effort, and resources required by Geisinger in connection with said Asset Purchase Agreement and, otherwise, in the development and maintenance of Physician's practice and in the event that Physician's relationship with Geisinger is terminated, the additional time and effort necessary to re-establish the practice which the Physician leaves. In the event the provisions of this section are deemed to exceed the time, geographic, or occupational limitation permitted by

> applicable law, then such provisions shall be automatically reformed to the maximum time, geographic, or occupational limitation permitted by applicable law.

First emphasis in text; second emphasis supplied. As noted, the restrictive covenant clause bars Dr. Di Cuccio from practicing medicine for two years from the termination of his employment with Geisinger. "Termination" is provided for in the employment agreement between Geisinger and the CAPS physicians as follows:

> 7. TERMINATION
>
> (a) Either party may at any time terminate this Agreement upon thirty (30) days prior written notice to the other. . . .
>
> (b) Physician understands and agrees that (i) his resignation or his other voluntary termination of this Agreement . . . may result in [pursuance] . . .of remedies at law or in equity [which] Geisinger may assert, including the provisions of the following paragraph 8 [the non-competition clause, supra]. It is understood that, solely for the purposes of this Paragraph 7 (b), the phrase 'termination' shall not include Physician's death, the circumstances described in subparagraph (c) below, incurrence of a disabling illness or injury

> which substantially interferes with his ability to carry out his duties hereunder or the release from employment, initiated by Geisinger without cause.
>
> (c) This Agreement is automatically terminated upon Physician's attainment of the age of seventy years.

First emphasis in text; subsequent emphasis supplied.

On January 23, 1990, Dr. Di Cuccio notified Geisinger in writing that he would be leaving the employ of the latter on February 28, 1990. Pursuant to the terms of Paragraph Seven, above, resignation of employment terminates the employment agreement with Geisinger. This is further evidence by the language of Paragraph Eight which indicates that its two-year restrictive provision is triggered by termination of employment which, in turn, effects cessation of the employment agreement.

Therefore, when Dr. Di Cuccio left its employ on February 28, 1990, he terminated his employment agreement with Geisinger, thereby triggering the restrictive covenant provisions of Paragraph Eight

thereof. In accordance with the plain terms of Paragraph Eight, then, Dr. Di Cuccio was barred from the practice of medicine within a fifty mile radius of Geisinger for a period of two years from February 28, 1990 to February 28, 1992. See Boyce v. Smith-Edwards-Dunlap Co., supra. In that case, we interpreted a non-competition clause in an employment agreement restricting involvement with a competing business for two years after Boyce's period of employment with the employer to bar Boyce's involvement with a competitor for a two-year period following termination of his employment with the predecessor to Smith-Edwards.

Similarly, the language of the restrictive covenant in this case is patently clear that the two-year bar takes effect only after the employment agreement has been terminated. We have already determined that the employment agreement is terminated upon cessation of employment by a CAPS physician with Geisinger. Therefore, Dr. Di Cuccio's arguments in his Brief to this

court to the contrary do not in any way undercut the plain language of the restrictive covenant clause of the employment agreement. We will not engage in a strained reading of contractual provisions which are clear on their face. See Green v. Oliver Realty Co., Inc., supra. The meaning of the restrictive covenant, therefore, must be determined by its contents, alone, for a court cannot supply or substitute contractual terms which are inconsistent with the parties' intent, the paramount goal of contract interpretation. Id. The record is devoid of fraud, collusion, overreaching or unequal bargaining power between the parties. In fact, Dr.Di Cuccio does not even allude to any of these improprieties. His argument is, instead, an indication of a relationship gone sour, and he now seeks to have this court rewrite the terms of the employment agreement to vindicate his discontent. This we decline to do.

In his second issue on appeal, Dr. Di Cuccio contends that the liquidated damages clause constitutes

an unconscionable and unenforceable penalty clause. The targets of Dr. Di Cuccio's attack in this regard are the waiver payment provision of the non-competition clause of the employment agreement and a clause in the asset purchase agreement providing for reduction of the purchase price in the amount of a terminating shareholder's proportionate interest.

The clause in the asset purchase agreement providing for purchase price reduction in the proportionate amount of a terminating shareholder's interest reads in relevant part:

> 1.4 Purchase Price. [Sets forth purchase price]
>
> (a) * * *
>
> (b) * * *
>
> (c) The payment of the full amount of the Adjusted Balance is expressly contingent upon the continued employment of the Shareholders pursuant to their respective Professional Employment Agreements with the Geisinger Clinic. If on or before January 2, 1990, a Shareholder's employment with Geisinger Clinic, [sic] has terminated pursuant to the provisions of paragraph 7(b) of said Professional Employment Agreement [supra], the amount then unpaid to Sellers

> [Geisinger] shall be reduced by the proportionate Shareholder interest held by such terminating Shareholder and set forth in Exhibit 1.4(c) . . . .

First emphasis in test; second emphasis supplied.

Dr. Di Cuccio's argument with regard to Paragraph 1.4 (c) of the asset purchase agreement is devoid of merit as the above provision has no application to the facts at bar. Dr. Di Cuccio terminated his employment with Geisinger on February 28, 1990. We have already determined Dr. Di Cuccio's termination of employment with Geisinger was pursuant to Paragraph Seven "(b)" of the employment agreement. The plain language of clause 1.4 4(c), above, indicates that the price reduction provision applies only to terminations effected on or before January 2, 1990. Therefore, this provision does not affect Dr. Di Cuccio's termination of employment. Moreover, the trial court entered judgment in favor of Geisinger only in the amount of Dr. Di Cuccio's compensation for the twelve months in question, or one hundred ninety-four thousand one hundred sixty-six

dollars and thirteen cents ($194,166.62).[1] Finding of Fact No. 12. This amount represented the liquidated damages agreed to by the parties to the employment agreement in the event of a breach of the non-competition clause of the agreement by any of the CAPS physicians. Therefore, Dr. Di Cuccio's argument that he would have been required to pay approximately five hundred thousand dollars ($500,000.00) in addition to one hundred sixty-five thousand dollars ($165,000.00) (his then annual salary) had he terminated the day after signing the employment agreement is irrelevant under the facts as they actually occurred.

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[1] The trial court found as a fact that Dr. Di Cuccio's salary for the prior twelve months in question to be one hundred ninety four thousand one hundred sixty-six dollars and thirteen cents ($194,166.13), although it entered judgment in the amount of one hundred ninety-four thousand one hundred sixty-six dollars and sixty-two cents ($194,166.62). The parties cite the latter figure in their respective appellate briefs as the amount of liquidated damages. We will accept this figure also.

Dr. Di Cuccio's argument regarding the invalidity of the waiver payment provision of the non-competition clause as a penalty or forfeiture is equally unavailing. Paragraph Eight "(b)" of the non-competition clause reads as follows:

> (b) If Physician desires to establish a practice within the restricted area during the two-year period following termination, Geisinger will waive this restriction upon the payment to it of a sum (the "Waiver Payment"), the amount of which shall be the greater of either: (i) One Hundred Sixty Five Thousand ($165,000) Dollars; or (ii) the total compensation paid Physician during the 12 calendar months preceding the month in which the termination occurred. It is further agreed and understood that because the financial burdens Geisinger would endure are difficult to ascertain and quantify, the amount of the Waiver Payment is a fair amount to pay as liquidated damages, and not as a penalty, in the event Physician desires to establish a practice within the restricted area during the two-year period.

Early in the history of our court, we delineated the four criteria to differentiate a liquidated damages provision from a penalty or forfeiture term in a restrictive covenant clause of an employment agreement.

> (1) 'When, independently of the stipulation, the damages would be wholly uncertain and incapable

> or very difficult of being ascertained, except by mere conjecture, then the damages will usually be considered liquidated:'
>
> (2) 'Where a party binds himself in a sum named not to carry on any particular trade, business or profession, within certain limits or within a specified period of time, the sum named will be regarded as liquidated damages and not as a penalty:'
>
> (3) 'A sum fixed as security for the performance of a contract containing a number of stipulations of widely different importance, breaches of some of which are capable of accurate valuation, for any of which the stipulated sum is an excessive compensation, is a penalty.'
>
> (4) 'When the covenant is for the performance of a single act or several acts, or the abstaining from doing some particular act or acts, which are not measurable by any exact pecuniary standard, and it is agreed that the party covenanting shall pay a stipulated sum as damages for a violation of any of such covenants, that sum is to be deemed liquidated damages and not a penalty:'

Stover v. Spielman, 1 Pa. Super. 526, 530-31 (1896), quoting 1 Sedgwick, Measure of Damages 549 (8th ed. 1891). Stover involved an agreement to purchase a bakery/confectionery business. The court held that the sale included the good will of the business, as well. Mr. Spielman agreed not to engage in the

bakery/confectionery business in the borough of Greencastle and within a five mile radius thereof, nor would he be employed as a clerk in any bakery/confectionery business within a four mile radius. The restrictive covenant provision recited that for violation thereof, Mr. Spielman agreed to pay the amount of eight hundred dollars ($800.00) to Mr. Stover as liquidated damages. Mr. Spielman contended that the eight hundred dollars ($800.00) to Mr. Stover as liquidated damages. Mr. Spielman contended that the eight hundred dollars damages amounted to a penalty. This court rejected Mr. Spielman's argument. In doing so it analyzed the case utilizing each of the above four criteria and concluded that each has been met to construe the eight hundred dollar damage clause as a liquidated damages provision rather than as a penalty clause.

We held, first, that the actual damages were uncertain and difficult to ascertain given that the actual

amount of loss might increase with each year. We also held that the amount of damages was reasonable in light of the fact that the sale of the business included its good will and a covenant not to conduct the same type of business within a certain geographic area. Relying upon Kelso v. Reid, 145 Pa. 606 (1892), an earlier decision of our supreme court regarding restrictive employment covenants, we concluded that criteria numbers one and two had been met to sustain the eight hundred dollar damage clause as one for liquidated damages. Secondly, we noted that the non-competition clause in the sales agreement concerning Mr. Spielman's employment as a bakery/confectionery clerk at another bakery/confectionery in Greencastle or his opening of a bakery/confectionery business in that same area referred to the same employment restriction, a promise not to engage in the same type of business which Mr. Spielman had sold to Mr. Stover. On that basis, we concluded that criteria numbers three and four had been satisfied to

classify the eight hundred dollar figure as a liquidated damages clause rather than one for penalty.

The principles outlining the differences between liquidated damages and penalties in Spielman v. Stover, supra, have been applied more recently to illustrate the problem regarding the unascertainability and difficulty of predicting actual damages in contract actions. In Commonwealth v. Musser Forests, Inc., 394 Pa. 205, 146 A.2d 714 (1959), our supreme court held that damages which are intended to be compensatory because of the indeterminate extent of the loss incurred are liquidated, rather than penal in nature.

Relying upon Kunkel & Jordan v. Wherry, 189 Pa. 201 (1899), this court, more recently in Holt's Cigar Co. v. 222 Liberty Associates, 404 Pa. Super. 578, 591 A.2d 743 (1991), held that the lynchpin of a liquidated damage clause is compensation for damages sustained. The court further observed that a provision which represents a good-faith and reasonable forecast of

anticipated damages for breach which are otherwise difficult to prove with certainly will be construed as one for liquidated damages rather than for punishment or to secure compliance. This court characterized liquidated damages as a measure of foreseeable business losses or as damages for loss of good will. If no measure of compensation is intended, the damages clause is a penalty to secure compliance. Id. In that case, we reiterated the factors to which we must look in deciding whether the damages are liquidated or for penalty:

> The question [of whether stipulation is a penalty or a valid liquidated damages provision]...is to be determined by the intention of the parties, drawn from the words of the whole contract, examined in the light of its subject-matter and its surroundings; and in this examination we must consider the relation which the sum stipulated bears to the extent of the injury which may be caused by the several breaches provided against, the ease or difficulty of measuring a breach in damages, and such other matters as are legally or necessarily inherent in the transaction.

At 587, 591 A.2d at 747, quoting Commonwealth v. Musser Forests, Inc., supra, at 212, 146 A.2d at 717. In Holt's the five hundred dollar per diem damage clause for

delay in construction was construed to be a penalty to force compliance with the work schedule rather than as a reasonable forecast of business loss damage due to delay and was therefore unenforceable as a matter of public policy.

Here, the waiver payment provision of the restrictive covenant clause of the employment agreement meets the above-stated criteria of the foregoing case law. Paragraph Eight "(a)" of the non-competition clause reads in part:

> It is understood that this restriction [the temporal and geographic limitation of a future medical practice] is necessitated in part because of the time, effort, and resources required by Geisinger in connection with said Asset Purchase Agreement and, otherwise, in the development and maintenance of Physician's practice [sic] and in the event that Physician's relationship with Geisinger is terminated, the additional time and effort necessary to re-establish the practice which the Physician leaves.

Paragraph Eight "(b)" of the non-competition clause--the waiver payment provision--states:

> [B]ecause the financial burdens Geisinger would endure are difficult to ascertain and quantify, the

> amount of the Waiver Payment is a fair amount to pay as liquidated damages, and not as a penalty, in the event Physician desires to establish a practice within the restricted area during the two-year period [as set forth in Paragraph "(a)"].

These provisions, we hold, satisfy the first, second and fourth criteria of a legally acceptable liquidated damages provision as set forth in Stover v. Spielman, supra, as these provisions convey the intent of compensation of Geisinger for unquantifiable business losses due the premature departure of Dr. Di Cuccio from its employ for the purpose of establishing a medical practice in competition with Geisinger within the prohibited temporal and geographic bounds of the non-competition clause. The above-recited provisions also fulfill the third criterion of Stover, supra, in that they refer to the same matter, i. e., termination of employment with Geisinger in order to establish a competing medical practice within the otherwise prohibited bounds of the covenant, and the amount of

damages so stipulated is solely for the purpose of protecting Geisinger in this event.

Our reading of the non-competition clause leads us to conclude that the waiver payment amounts to no more than a liquidated damages provision to compensate Geisinger for anticipated business or good will losses if the event described in Paragraph Eight "(a)" occurs and that it represents a reasonable forecast of damages which would be otherwise unquantifiable as a measure of compensation to Geisinger. Musser Forests, Inc., supra; Holt's, supra. It is not designed to secure compliance with the terms of the employment agreement or to punish Dr. Di Cuccio for terminating. Id. In fact, the employment agreement does not prohibit Dr. Di Cuccio or any other physician from terminating his or their employment relationship(s) with Geisinger, nor does it threaten Dr. Di Cuccio or any other CAPS physician with any sanction for voluntary termination.

Generally, a restrictive employment covenant may be enforced if it is ancillary to an employment agreement or a contract for the sale of a business and if it is necessary to protect the legitimate interests of the employer or the purchaser of a business. Westec Security Services, Inc. v. Westinghouse Electric Corp., 538 Fed. Supp. 108 (E. D. Pa. 1982) (interpreting Pennsylvania law). Specifically, restrictive covenants ancillary to the sale of a business, as here, are designed to protect, in addition to physical assets and investments, the good will of the business, i. e., its name, reputation and reliability. Morgan's Home Equipment Corp. v. Martucci, supra. For that reason, a restrictive covenant ancillary to the sale of a business promotes "goodwill [as] a saleable asset 'by protecting the buyer in the enjoyment of that for which he pays.'" Westec, supra, at 121, quoting 6A Corbin, The Law of Contracts, §§1385, 1387, and citing Morgan's Home, supra. It is the interference with or the destruction of

the good will purchased with the physical attributes of the business which is unascertainable and unquantifiable in terms of actual loss, thereby triggering the necessity for a liquidated damages clause. See John G. Bryant Co., Inc. v. Sling Testing and Repair, Inc., 471 Pa. 1, 369 A.2d 1164 (1977), and Robert Clifton Associates, Inc. v. O'Connor, 338 Pa. Super. 246, 487 A.2d 947 (1985). Therefore, the language contained in Paragraphs Eight "(a)" and "(b)" with respect to protecting Geisinger's interest in its investment and its inability to quantify or ascertain with specificity any losses which it would incur in the event of a breach of the non-competition clause by any CAPS physician was proper.

In light of the above, we hold that the waiver payment provision of the non-competition clause of the employment agreement between Dr. Di Cuccio and Geisinger represents a valid liquidated damages clause, rather than a penalty, designed to reasonably protect Geisinger in its purchase of both the physical assets and

the good will of CAPS and that the loss suffered by Geisinger as a result of Dr. Di Cuccio's untimely termination of his employment relationship with Geisinger and his subsequent establishment of a competing medical practice within the prohibited temporal and geographic bounds of the restrictive covenant is unascertainable and unquantifiable so as to justify the imposition of damages as bargained for by the parties, themselves.

Lastly, Dr. Di Cuccio complains that the trial court, in entering a declaratory judgment in favor of Geisinger in the amount of one hundred ninety-four thousand one hundred sixty-six dollars and sixty-two cents ($194,166.62), which is the amount of liquidated damages to which Geisinger was entitled under Paragraph Eight "(b)" of the employment agreement, did so without affording him the right to assert a counterclaim for a set-off on which he would have otherwise been entitled to a trial by jury.

The purpose of awarding declaratory relief is to finally settle and make certain the rights or legal status of parties. New London Oil Co., Inc. v. Ziegler, 336 Pa. Super. 380, 485 A.2d 1131 (1984). Section 7533 of the Declaratory Judgments Act, 42 Pa. C. S. A. §§7531 et seq., provides in relevant part: "Any person interested under a . . . written contract . . . may have determined any question of construction or validity arising under the . . . contract . . . and obtain a declaration of rights, status, or other legal relations thereunder." Additionally, Section 7534 states: "A contract may be construed either before or after there has been a breach thereof." See also New London Oil, supra. Moreover, we have held that a declaratory judgment proceeding is a proper form of action in which to determine the validity of a restrictive covenant of employment. Bahleda v. Hankison Corp., 228 Pa. Super. 153, 323 A.2d 121 (1974); Wilshire v. Penn Overall Supply Co., 227 Pa. Super. 30, 33, 323 A.2d 239, 240 (1974).

Here, the trial court first construed the waiver payment provision of the restrictive covenant as a valid liquidated damages clause rather than as a void penalty provision. The court then declared the right of Geisinger to receive this waiver payment pursuant to the terms of the restrictive covenant. Having so declared the validity of the waiver payment clause and the right of Geisinger to receipt of the waiver payment, the trial court then proceeded to enter judgment for the amount of the waiver payment, plus interest, in favor of Geisinger.

Dr. Di Cuccio now contends that he had reserved the right to counterclaim for a set-off against the judgment and that the trial court's refusal to amend the Order entering judgment to make it subject to the establishment of any counterclaim denied him the right to a trial by jury on his counterclaim. We disagree.

For the first time in a Motion for rehearing filed subsequent to the Order of April 1, 1991, entering a declaratory judgment in favor of Geisinger, Dr. Di Cuccio

raised the issue of counterclaiming for a set-off of damages. This contention was not included among Dr. Di Cuccio's exceptions filed to the decree nisi entered on October 3, 1990, awarding a declaratory judgment in favor of Geisinger. It was also not included in Dr. Di Cuccio's Brief filed in support of his exceptions to the decree nisi.

Aside from the possibility of this issue having been waived on appeal, it is meritless in any event. First, no indication appears of record that Dr. Di Cuccio, as he claimed at the May 31, 1991, hearing, had reserved his right at any time to file a counterclaim. Counsel for Dr. Di Cuccio stated at the hearing of May 31, 1991, that this understanding had been reached by the court and the parties at a prior court conference of an unspecified date. However, no transcription or other documentation of this court conference appears in certified record of this case.

Secondly, at the hearing on the Motion held on May 31, 1991, the court requested counsel for Dr. Di Cuccio to delineate the specific contours of the proposed counterclaim. Counsel responded that the purpose of the counterclaim would be to set off some unspecified amounts which Geisinger had purportedly deducted from the monies which were actually allegedly due Dr. Di Cuccio. Counsel also alluded to some other various undefined "calculations made throughout the life of the contract, not just the final payment, that were made purely by Geisinger within their discretion which Doctor Di Cuccio would challenge as being accurate." N. T. May 31, 1991, 9. Other than these bald statements, counsel never imparted to the trial court, nor are we able to glean from a reading of his appellate brief, the specific calculations or withheld monies now claimed by Dr. Di Cuccio and the factual predicate therefor.

Notwithstanding, counsel then requested the court to amend its final Order entering the declaratory

judgment to allow for the determination of damages subject to a counterclaimed set off, even though counsel conceded that Dr. Di Cuccio had not at the pleading stage filed any counterclaim for a set-off because he did not wish to stall the progress of the case to final determination of the validity of the employment agreement--specifically, the restrictive covenant clause--and because of an alleged prior reservation to file a counterclaim at a later date. Counsel also acknowledged that the entry of judgment for the amount of liquidated damages provided for in the employment agreement would be subject to any counterclaimed set-off only if Dr. Di Cuccio could first establish his right to the latter. As we have already seen, counsel for Dr. Di Cuccio was unable to articulate any specific factual basis for the counterclaim at the hearing before the trial court. He has similarly failed here on appeal.

Dr. Di Cuccio filed an Answer and New Matter to Geisinger's amended Complaint in Equity in which he

attacked the validity and enforceability of the employment agreement for failure of consideration on the basis of vagueness, indefiniteness and illusoriness. He also averred that the non-competition clause of the employment agreement was void as being violative of public policy. Dr. Di Cuccio did not, as part of this pleading or anywhere else in the record, file the counterclaim which he now maintains he has the right to assert. Our review of the record does not indicate that Dr. Di Cuccio was ever precluded, prior to the entry of judgment, from asserting any set-off which he now claims that he is due.

Counsel for Dr. Di Cuccio indicated at the hearing of May 31, 1991, that he had not asserted a counterclaim for set-off because he did not wish to stall the declaratory judgment proceeding by having to litigate his claims. However, at the hearing, he requested the court to amend its Order to make the judgment entered therein for liquidated damages subject to any recovery as

a result of a yet-to-be-filed counterclaimed set-off, the factual predicate for which, as we have seen, counsel was unable to impart to the court when requested to do so. The court recommended to Dr. Di Cuccio that he file a separate action to accomplish this purpose. Whether at law or in equity, a party may file a separate action for the claims upon which he would otherwise rest his counterclaim. See Oak Lane Shopping Center v. Flame, 264 Pa. Super. 9, 398 A.2d 721 (1979) (equity action) and American Telephone and Telegraph v. Clifford, 406 Pa. Super. 128, 593 A.2d 903 (1991) (action at law). Therefore, the court acted properly in refusing to amend the Order to allow for the possibility of a set-off, especially in light of counsel's inability to articulate the basis therefor and because of the availability of the remedy of filing an independent cause of action to assert this same alleged claim.

Moreover, even if the court had acceded to counsel's request to amend the Order, it does not follow

that Dr. Di Cuccio would have been entitled to a jury trial on his claim for set-off. Pennsylvania Rule of Civil Procedure 1602 states: "In any action at law or in equity, a party may include in the claim for relief a prayer for declaratory relief and the practice and procedure shall follow, as nearly as may be, the rules governing that action." Since Geisinger had included in its Complaint a count requesting declaratory relief, this rule governs here. A proceeding for declaratory relief under Rule 1602 does not afford a party an independent right to a jury trial other than what he/she/it may be entitled to on the underlying cause of action. Brenckle v. Arblaster, 320 Pa. Super. 87, 466 A.2d 1075 (1983); 42 Pa. C. S. A. §7539 (b). Therefore, a claim for declaratory relief made pursuant to Rule 1602 may be part of an action at law or one in equity and will proceed in accordance with the rules governing the applicable action. Id; Brenckle v. Arblaster, supra.

Geisinger filed a Complaint in Equity in which it asserted, inter alia, a claim for relief requesting a declaration that Dr. Di Cuccio is in breach of the non-competition clause of the employment agreement, that the waiver payment provision of the clause is binding and valid and that as a result thereof, Geisinger is entitled to liquidated damages as set forth in that provision. Geisinger also sought, alternatively, a claim for injunctive relief. Geisinger's amended Complaint in Equity also included separate counts for various claims sounding in tort and in contract. These counts were discontinued after the Order of April 1, 1991, entering a declaratory judgment in favor of Geisinger had been filed but before the hearing of May 31, 1991. Thus, on the date of the hearing, at which Dr. Di Cuccio first asserted his right to file a counterclaim for set-off and his right to a jury trial therefor, only two counts of the Complaint remained--one for declaratory relief and the other for the alternative remedy of injunctive relief.

Since we conclude that Geisinger's action, as nearly as may be,[2] sounded in equity, rather than at law, any counterclaim which Dr. Di Cuccio could have asserted in any event would have been required to conform to the requirements of Pa. R. Civ. P. 1510 for the pleading of counterclaims to actions in equity. Rule 1510 states:

> (a) A defendant may plead as a counterclaim only a cause of action, whether equitable or legal, which arises from the same transaction or occurrence or series of transactions or occurrences from which the plaintiff's cause of action arose. . . .
>
> (b) A counterclaim shall be pleaded and tried as an action in equity.

It thus appears that under Rule 1510, it matters not whether the counterclaim rests in equity or at law. If it arises out of the same transaction or occurrence from which the plaintiff's cause in equity arose, it must be litigated as an equity matter.

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[2] See Brenckle v. Arblaster, supra, and Pa. R. Civ. P. 1602, supra, in text.

Geisinger requests performance on the part of Dr. Di Cuccio for the payment of liquidated damages in the amount agreed to by the parties according to the formula prescribed in Paragraph Eight "(b)" of the employment agreement. Dr. Di Cuccio indicated to the trial court at the May 31, 1991 hearing and now states to this court that his proposed counterclaim would be in the nature of a set-off to the liquidated damages which the trial court found due and owing and upon which the court entered a declaratory judgment in favor of Geisinger. We construe Geisinger's request for relief as one for specific performance for payment of the liquidated damages due it under the terms of the employment agreement. As such, it is an equitable remedy which permits a court to compel performance of a contract when there exists in the contract an agreement between the parties as to the nature of the performance. Cimina v. Bronich, 349 Pa. Super. 399 (1985), reversed, granting specific performance, 517 Pa.

387, 537 A.2d 1355 (1988); Turner v. Hostetler, 359 Pa. Super. 167, 518 A.2d 833 (1986). In this case, the employment agreement set forth the nature of the performance to which the parties agreed. If Dr. Di DiCuccio terminated his employment with Geisinger before the end of the two-year restriction and embarked upon a competing medical practice within the prohibited geographical bounds of the restrictive covenant, he would be required to perform on his agreement to pay liquidated damages.

This being the case, Dr. Di Cuccio was not entitled to a jury trial on any counterclaim which he could have asserted. A party who chooses to assert a counterclaim at law in an equity action, rather than to file an independent cause of action at law on the same matter waives his right to have these issues of fact determined by a jury. Rosenberg v. Rosenberg, 322 Pa. Super. 293, 469 A.2d 167 (1980). See also Brenckle v. Arblaster, supra. Cf. United States v. Wade, 653 F.

Supp. 11 (E. D. Pa. 1984) (in declaratory judgment proceeding declaring liability for payment of response costs under the Comprehensive Environmental Response, Compensation and Liability Act, 42 U. S. C. §§ 9601 et seq., underlying remedy is equitable in nature and invokes no right to a jury trial).

Order affirmed.

JUDGMENT ENTERED
DATED: APRIL 3, 1992

S/Mildred E. Williamson
DEPUTY PROTHONOTARY

IN THE COURT OF COMMON PLEAS OF CLINTON COUNTY, PENNSYLVANIA

| | | |
|---|---|---|
| GEISINGER CLINIC, a Pennsylvania Non-Profit Corporation, Plaintiff, | ) | NO. 6 - 90 |
| Vs. | | |
| NICHOLAS W. DICUCCIO, M.D., Defendant. | ) | |

OPINION AND ORDER

Before the Court is the Plaintiff's Motion for Declaratory Judgment arising out of the parties' Professional Employment Agreement [Employment Agreement] and the subsequent alleged breach by the Defendant.

Defendant, Nicholas W. DiCuccio, M.D., [DiCuccio] is a general surgeon who was employed by Plaintiff, Geisinger Clinic [Geisinger] from May 13, 1986, until February 28, 1990. His employment with Geisinger arose out of Geisinger's entering into an asset purchase

agreement with DiCuccio, six other physicians, and the Clinton Association of Physicians and Surgeons [CAPS] which was a professional corporation formed by those physicians.

Under the asset purchase agreement Geisinger agreed to purchase the assets of CAPS. DiCuccio personally received a percentage of the purchase price and other benefits.

The asset purchase agreement was conditioned on each of the physicians entering into an Employment Agreement with a restrictive covenant prohibiting each of them from practicing medicine within a fifty-mile radius of their office for a period of two years after termination of their medical practice employment with Geisinger. On February 28, 1990, DiCuccio left Geisinger and immediately began the practice of medicine a few miles away from his former practice with Geisinger. In the present action, Geisinger seeks Declaratory Judgment for liquidated damages or in the alternative, injunctive relief

prohibiting DiCuccio from practicing medicine in violation of the restrictive covenant contained within the contract. By agreement of counsel, hearings were confined to Geisinger's Motion for Declaratory Judgment.

From the testimony we make the following:

FINDINGS OF FACT

1. Geisinger Clinic [Geisinger] is a Pennsylvania Non-profit Corporation engaged in the business of providing health care services in Clinton County, Pennsylvania, and other areas of Pennsylvania.

2. Defendant, Nicholas W. DiCuccio, M.D., [DiCuccio] is a general surgeon who was employed by Geisinger Clinic from May 13, 1986 until February 28, 1990. His office during that period was in Mill Hall, Pennsylvania.

3. On May 2, 1986, Geisinger entered into an Asset Purchase Agreement with DiCuccio, six other physicians and the Clinton Association of Physicians and

Surgeons [CAPS], which was a professional corporation formed by those physicians.

4. Under the Asset Purchase Agreement, Geisinger promised to buy the assets of the professional corporation. DiCuccio personally received $520,446.57 plus interest on the purchase price. Geisinger also acquired the debts of CAPS for which DiCuccio until then had been individually liable and provided DiCuccio with certain benefits as an employee.

5. In exchange, pursuant to the terms of the Asset Purchase Agreement, Geisinger acquired the assets of the professional corporation, including equipment; inventories; realty; and, in particular, the goodwill of that corporation.

6. At the time that Geisinger acquired CAPS, there was significant goodwill associated with the CAPS group due to its reputation, relationship with patients, and its image within the community.

7. Approximately half of the purchase price paid by Geisinger was on account of the goodwill of the professional corporation.

8. A condition of the Asset Purchase Agreement was that each of the physicians enter into an Employment Agreement with Geisinger.

9. DiCuccio entered into his Professional Employment Agreement [Employment Agreement] with Geisinger on the same day that he executed the Asset Purchase Agreement.

10. The transaction was negotiated at arm's length between the parties over a two-year period and DiCuccio was represented by able counsel throughout the negotiations.

11. The Employment Agreement sets forth the terms and conditions of DiCuccio's employment, including the following two provisions:

8. NONCOMPETITION

(a) It is understood and agreed that Physician shall not, following termination of employment, directly

or indirectly, enter into the practice of medicine, as an individual, as a partner or joint venturer, as employee or agent for any person or organization, or obtain clinical privileges at any hospital or healthcare facility within the restricted area described by a radius of fifty (50) miles from such medical office facility designated as the principal site of physician's medical office practice at the time of such termination. This restriction shall endure for a period of two years from the date of termination of this Agreement and regardless of the grounds, if any, therefor. It is understood that this restriction is necessitated in part because of the time, effort, and resources required by Geisinger in connection with said Asset Purchase Agreement and, otherwise, in the development and maintenance of Physician's practice and in the event that Physician's relationship with Geisinger is terminated, the additional time and effort necessary to re-establish the practice which the Physician leaves. In the event the provisions of this section are deemed to exceed the time, geographic, or occupational limitations permitted by applicable law, the such provisions shall be automatically reformed to the maximum time, geographic, or occupational limitation permitted by applicable law.

(b) If Physician desires to establish a practice within the restricted area during the two-year period following termination, Geisinger will waive this restriction upon the payment to it of a sum (the "Waiver Payment"), the amount of which shall be the greater of either: (i) One Hundred Sixty Five Thousand ($165,000) Dollars; or (ii) the total compensation paid Physician during the 12 calendar months preceding the month in which the termination occurred. It is further agreed and understood that because the financial burdens Geisinger would endure are difficult to ascertain and quantify, the amount of the Waiver Payment is a fair amount to pay as liquidated damages, and not as a penalty, in the event

Physician desires to establish a practice within the restricted area during the two-year period.

12. DiCuccio's total compensation during the twelve months in question was $194,166.13.

13. On January 23, 1990, DiCuccio notified Geisinger by letter that he would be leaving his employment with Geisinger on February 28, 1990.

14. On February 1, 1990, Dr. Joseph A. Weader, President of Geisinger Clinic, wrote a letter to DiCuccio accepting DiCuccio's letter of resignation and reminding DiCuccio of his noncompetition obligations in his Employment Agreement.

15. At the time of his departure, Geisinger gave DiCuccio a written calculation of his waiver payment.

16. Upon his departure from Geisinger, DiCuccio immediately began the full practice of medicine within a few miles from his former practice with Geisinger.

17. In addition to DiCuccio, three other Geisinger employees left to work for DiCuccio in his new practice.

18. While he was employed at Geisinger, DiCuccio told his Geisinger patients that they could continue their care with him when he opened his own private practice.

19. Since reopening his private practice, hundreds of patients who DiCuccio treated while he was employed by Geisinger asked to have their records referred to him.

20. Shortly after leaving Geisinger, DiCuccio advertised his practice in area newspapers and on the radio.

21. A very significant part of the revenues of Geisinger Medical Center are based upon referral of patients from other Geisinger Clinic groups. While he was a Geisinger Clinic employee, DiCuccio brought in hundreds of thousands of dollars in revenue and frequently referred patients to other Geisinger physicians both within the CAPS group and at Geisinger Medical Center at Danville, Pennsylvania.

22. The parties expressly agreed in Paragraph 8(b) of the Employment Agreement that the financial burdens, which Geisinger Clinic would endure in the event of a breach by DiCuccio of his covenant not to compete, are difficult to ascertain and quantify.

23. The damages which Geisinger Clinic would suffer in the event of a breach by DiCuccio of his covenant not to compete are difficult to ascertain and quantify.

24. The purpose of the liquidated damages clause in Paragraph 8(b) of the Employment Agreement was to provide an agreed-upon evaluation of the damages that Geisinger would be compensated if DiCuccio breached his covenant not to compete. The parties agreed that it would be best to agree to the amount of liquidated damages up front.

25. The parties expressly agreed in Paragraph 8(b) of the Employment Agreement that the waiver payment is a fair amount to pay as liquidated damages to

compensate Geisinger in the event that DiCuccio establishes a medical practice within the geographically restricted area during the two years following the termination of his employment.

26. The waiver payment is a fair and reasonable amount to pay as liquidated damages to compensate Geisinger in the event that DiCuccio establishes a medical practice within the geographically restricted area during the two years following the termination of his employment.

27. Geisinger has fulfilled all of its obligations under the Employment Agreement.

28. DiCuccio has refused to make the waiver payment.

## DISCUSSION

### I. Jurisdiction

Geisinger seeks relief under the Declaratory Judgment Act 42 Pa.C.S.A. § 7531, et seq. That Act

provides at 42 Pa.C.S.A. § 7532 that:

> Courts of record, within their respective jurisdictions, shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect, and such declarations shall have the force and effect of a final judgment or decree.

The following section at 42 Pa.C.S.A. § 7533 provides in pertinent part:

> any person interested under a . . . written contract . . . may have determined any question of construction or validity arising under the . . . contract . . . and obtain a declaration of rights, status, or other legal relations thereunder.

The Declaratory Judgment Act is to be liberally construed and administered. 42 Pa. C.S.A. § 7451. The purpose of the Act is to settle and afford relief from uncertainty and insecurity with respect to rights, status and other relations. Fidelity Bank v. Pennsylvania Turnpike Commission, 498 Pa. 80, 444 A.2d 1154 (1982). The construction of documents, including written contracts and leases, may properly be the subject

of an action for declaratory judgment. New London Oil Company, Inc., v. Ziegler, 336 Pa. Super. 380, 485 A.2d 1131 (1984).

It has been held that:

> Relief by declaratory judgment or decree may be granted in all civil cases where (1) an actual controversy exists between contending parties, or (2) where the court is satisfied that antagonistic claims are present inevitable litigation, or (3) where in any case the court is satisfied that a party asserts a legal relation, status, right or a privilege in which he has a concrete interest and that either (i) there is challenge or denial of such asserted relation, status, right or privilege by an adversary party who also has or asserts a concrete interest therein . . . and the Court is satisfied also that a declaratory judgment or decree will serve to terminate the uncertainty or controversy giving rise to the proceeding. . .

Falls Township v. McManamon, 113 Pa. Commonwealth Ct., 504, 537 A.2d 946, 948 (1988); Friestad v. Travellers' Indemnity Company, 452 Pa. 417, 306 A.2d 295, 296 (1973).

Under the applicable law, the written contract at issue in this case may properly be the subject for declaratory judgment. Controversy exists and the Act

will serve to settle and afford relief from the uncertainty with respect to rights and obligations under the contract.

II. Validity of Restrictive Covenant

Having determined that the Declaratory Judgment Act is available and appropriate to settle this matter, it is necessary to determine the validity of the portion of the contract in dispute.

As part of the Employment Agreement DiCuccio agreed that he would not practice medicine within a fifty-mile radius of his principal place of business with Geisinger for a period of two years. Another provision of the same agreement provides that Geisinger would waive that restrictive covenant upon payment by DiCuccio of the greater of either $165,000.00 or DiCuccio's total compensation paid during the twelve months preceding his termination.

At issue is the validity of the restrictive covenant and the enforceability of the provision for liquidated damages for Geisinger's forced waiver of the restrictive

covenant because of DiCuccio's continuing breach.

First, with respect to the restrictive covenant, our Court have held that equitable enforcement of such covenants is permitted when they are incident to an employment relation between the agreements' parties, they are reasonably necessary for the protection of the employer, and they are reasonably limited in duration and geographic extent. Blair Design and Construction Company, Inc. v. Kalmon, 366 Pa. Super. 194, 530 A.2d 1357 (1987); Sidco Paper Company v. Aaron, 465 Pa. 586, 351 A.2d 250 (1976).

The covenant pertaining to DiCuccio satisfied these requirements. It is reasonably limited in time as the restriction is only for a period of two years. See John G. Bryant Company Inc. v. Sling Testing and Repair, Inc., 471 Pa. 1, 369 A.2d 1164 (1977) (three year period of noncompetition held reasonable). It is also reasonably limited in geographic extent as it applies only to a fifty-mile radius which is certainly a limited area in

which Geisinger has a reasonable interest in restricting competition. See Hayes v. Altman, 424 Pa. 23, 225 A.2d 670 (1967) (covenant not to compete is reasonably limited if restricted to area reasonably necessary to protect employer's interest). Geisinger's reasonable interest is to protect the goodwill it has developed with its patients. The restriction does not impose an undue hardship on DiCuccio because he is not restricted in any manner outside the zone specified in the covenant.

Additionally, the covenant executed by DiCuccio was ancillary to employment with Geisinger. A condition of the Asset Purchase Agreement was that each of the physicians, including DiCuccio, enter into the Employment Agreement and both Agreements were signed on the same day as reasonably necessary for the protection for the employer. Courts have consistently held that the taking of employment is itself sufficient consideration for a covenant not to compete. Record Center, Inc., v. Comprehensive Management, Inc., 363

Pa. Super. 79, 525 A.2d 433 (1987); Capital Bakers v. Townsend, 426 Pa. 188, 231 A.2d 292 (1967).

The restrictive covenant satisfying the requirements as aforesaid, we find that the covenant is valid and enforceable.

III. Liquidated Damages

The final issue is whether the liquidated damages provision in the Employment Agreement is valid and enforceable.

Pennsylvania follows the principle set forth in the original Restatement of Contracts (1932) in this regard. When the parties have made a reasonable forecast as to the just compensation for an injury that was difficult to estimate at the time they entered into the contract, that provision will be deemed to be one for liquidated damages, and enforceable. Finkle v. Gulf & Western Mfg. Company, 744 F.2d 1015 (3rd Circuit 1984). If, on the other hand, the amount of damages assessed is subsequently adjudged unreasonable in the

light of either anticipated or actual harm, the contractual provision will be voided as a penalty. Unit Vending Corp. v. Tobin Enterprises, 194 Pa. Super. 470, 168 A.2d 750 (1961).

The liquidated damages (waiver of payment clause) of the Employment Agreement sets forth that if a physician wished to have the restrictive covenant waived, that individual agreed to pay a determined amount of money to Geisinger for any injury it may suffer. The option articulated within the waiver of payment stated that the physician must pay the greater amount of $165,000.00 or the total compensation received by the physician during the twelve calendar months preceding the month in which the termination occurred. The two parties had agreed to this liquidated damage agreement over a two-year negotiation period in which both were represented by counsel.

We find this provision of the Employment Agreement valid as a liquidated damages provision, and

enforceable. The injury caused by the violation of the covenant not to compete is particularly difficult to quantify for damage purposes and a liquidated damages provision is favored. Records Company v. Comprehensive Management, 363 Pa. Super. 79, 525 A.2d 433 (1987). A liquidated damages provision was especially appropriate because DiCuccio's financial productivity affected the amount of damages Geisinger would suffer upon DiCuccio's leaving. Geisinger is also concerned with the loss of goodwill based upon DiCuccio's excellent reputation, the many thousands of patients he had treated in the area, and the fact that hundreds of Geisinger Clinic patients have already asked to have their records transferred from Geisinger to him. Additionally, DiCuccio had told his Geisinger Clinic patients that they could continue their care with him at his new location. Geisinger indicates other significant damages as a result of DiCuccio's leaving, including the

loss of direct patient revenues and referral-based patient revenues.

The liquidated damages provision cannot be characterized as a sum so disproportionate to the probable anticipated loss as to actually be a penalty designed to induce performance rather than a means to provide just compensation for losses. We find the amount articulated on the waiver clause of $165,000.00 or the total compensation paid the physician during the twelve calendar months preceding the month in which the termination occurred to be a fair and reasonable amount. We also find that there was an intention on the part of the parties to liquidate damages in advance, the negotiations having occurred over a two-year period.

IV. Validity of Employment Contract

Employment contracts are enforceable where the parties reach mutual agreement, exchange consideration, and have outlined the terms of their bargain with sufficient clarity.

> "An agreement is sufficiently definite if the parties intended to make a contract and there is reasonably certain basis upon which a Court can provide an appropriate remedy." Greene v. Oliver Realty, Inc., 363 Pa. Super., 534, 526 A.2d, 1192, 1194.

We find the parties reached a mutual agreement, exchanged consideration, and outlined the terms of the Employment Agreement with sufficient clarity. The Court finds that the Professional Employment Agreement is a valid and enforceable contract, that Geisinger complied with its contractual obligations in good faith, and that DiCuccio breached the terms of the agreement.

In accordance herewith, we make the following:

CONCLUSIONS OF LAW

1. The Court has jurisdiction.
2. An action for declaratory judgment is proper.
3. The restrictive covenant clause in the agreement is valid and enforceable.
4. In Paragraph 8(b) of the Employment Agreement, the parties agreed to a valid binding and enforceable liquidated damages

provision, which is not a penalty but an agreed upon amount to compensate Geisinger Clinic in the event that Dr. Nicholas W. DiCuccio breached his agreement not to compete as set forth in Paragraph 8(a) of the agreement.

5. The Professional Employment Agreement between Geisinger Clinic, Plaintiff, and Nicholas W. DiCuccio, M.D., Defendant, is valid, binding and enforceable.

6. Nicholas W. DiCuccio, M.D., breached the covenant not to compete and his breach is of a continuing nature.

7. Geisinger is entitled to liquidated damages from Nicholas W. DiCuccio, M.D., in the amount of $194,166.62.

IN THE COURT OF COMMON PLEAS OF CLINTON COUNTY, PENNSYLVANIA

| | | |
|---|---|---|
| GEISINGER CLINIC, a Pennsylvania Non-Profit Corporation, Plaintiff | ) | NO. 6 - 90 |
| Vs. | ) | |
| NICHOLAS W. DICUCCIO, M.D., Defendant | ) | |

ORDER

AND NOW, October 3, 1990, Geisinger Clinic's Motion for Declaratory Judgment is granted and judgment is entered in favor of Geisinger Clinic and against Nicholas W. DiCuccio, M.D. in the amount of $194,166.62 plus interest.

The parties may file exceptions to this Opinion and Decree within ten (10) days from the date hereof. If no exceptions are filed the Clerk of Court shall enter this decree as final judgment.

BY THE COURT:

S/Charles F. Greevy
C. Greevy
Senior Judge
Specially Presiding

IN THE COURT OF COMMON PLEAS OF CLINTON COUNTY, PENNSYLVANIA

| | | |
|---|---|---|
| GEISINGER CLINIC, a Pennsylvania Non-Profit Corporation. Plaintiff | : | NO. 6-90 (EQUITY) |
| v. | : | |
| NICHOLAS W. DICUCCIO, M.D., Defendant | : | |

ORDER

AND NOW, this 28th day of March, 1991, the Defendant's Exceptions to this Court's Opinion and Order of October 3, 1990, are dismissed, the Defendant's Request for Post Trial Relief is denied, and this Court's Order of October 3, 1990, entering judgment in favor of Geisinger Clinic and against Nicholas W. Dicuccio, M.D. in the amount of $194,166.62, plus interest from

March 1, 1990, is affirmed. The Clerk of Courts shall enter this Order accordingly.

BY THE COURT:

S/Charles F. Greevy
C. F. Greevy,
Senior Judge
Specially Presiding

cc: Richard Saxton
Allan Lugg
Robert Butler
Diane Siegel Danoff

IN THE COURT OF COMMON PLEAS OF CLINTON
COUNTY, PENNSYLVANIA
CIVIL ACTION - LAW

| | | |
|---|---|---|
| GEISINGER CLINIC, a Pennsylvania Non-Profit Corporation, Plaintiff | ) | NO. 6 - 90 (EQUITY) |
| Vs. | ) | |
| NICHOLAS W. DICUCCIO, M.D., Defendant | ) | |

ORDER

AND NOW, May 31, 1991, after hearing argument from counsel, IT IS HEREBY ORDERED that the Rule to Show Cause is dismissed and Defendant's Motion to Amend or Vacate Judgment is denied.

BY THE COURT:

S/Charles F. Greevy
Charles F. Greevy
Senior Judge
Specially Presiding

IN THE COURT OF COMMON PLEAS OF
CLINTON COUNTY, PENNSYLVANIA

| | | |
|---|---|---|
| GEISINGER CLINIC<br>a Pennsylvania Non-Profit<br>Corporation,<br>Plaintiff | ) | NO 6- 90 (EQUITY) |
| Vs. | ) | |
| NICHOLAS W. DICUCCIO,<br>M.D.,<br>Defendant | ) | |

STATEMENT OF REASONS PURSUANT TO Pa. R.A.P. .
No. 1925(A)

The place in the record where the reasons for the Court's rulings in the above-captioned matter may be found is as follows:

1. Opinion and Order dated October 3, 1990

BY THE COURT:

Dated: May 31, 1991

s/Charles F. Greevy
Charles F. Greevy,
Senior Judge
Specially Presiding

cc: Richard Saxton
Allan Lugg
Robert Butler
Diane Siegel Danoff

SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

Charles W. Johns, Esquire
Prothonotary

434 Main Capitol Building
P.O. Box 624
Harrisburg, Pennsylvania
17108
(717) 787-6181

November 29, 1993

Jeffrey W. Stover, Esq.
NOVAK, STOVER & McCARTY
P.O. Box 209
Bellefonte, PA 16823

Re: GEISINGER CLINIC,
A Pa Non-Profit Corporation
v. NICHOLAS W. DICUCCIO, M.D.
No. 0170 m.d. Allocatur 1992

Dear Petitioner:

This is to advise that the following Order has been endorsed on the Petition for Allowance of Appeal in the above-captioned matter:

"1/18/93
Petition Denied.
Per Curiam"

Sincerely yours,
PROTHONOTARY'S OFFICE
SUPREME COURT OF PENNSYLVANIA

CWJ/
c: Olszewski, Hudock & Brosky, JJ
Superior Court 253HBG91
Greevy, Charles F., J. (Spec. Lycoming Co) Clinton
Civil 6-90 (Equity)
Alan D. Berkowitz, Esq.
Allan W. Lugg, Esq.

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

| | | |
|---|---|---|
| GEISINGER CLINIC, a Pennsylvania Non-Profit Corporation, | : | NO. 170 M.D. DKT. 1992 |
| Respondent, | : | |
| v. | : | |
| NICHOLAS W. DICUCCIO, M.D., | : | Application for Reconsideration of Denial of Allowance |
| Petitioner. | : | of Appeal |

ORDER

PER CURIAM:

AND NOW, this 31st day of August, 1994, the Application for Reconsideration of Denial of Allowance of Appeal in the above matter is hereby denied.

Mr. Justice Montemuro is sitting by designation as Senior Justice pursuant to Judicial Assignment Docket No. 94 R1801, due to the unavailability of Mr. Justice Larsen, see No. 127 Judicial Administration Docket No. 1, filed October 28, 1993.

TRUE & CORRECT COPY
ATTEST: SEP 2, 1994
S/Shirley Bailey
Chief Clerk

## TEXT OF CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Article I, § 8, clause 3:

> The Congress shall have power . . . To regulate commerce with foreign nations, and among the several states, and with the Indian tribes.

United States Constitution, Amendment VII:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall otherwise by re-examined in any court of the United States, then according to the rules of the common law.

United States Constitution, Amendment XIV, § 1:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities or citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Pennsyivania Constitution, Article I, § 6:

> Trial by jury shall be as heretofore, and the right thereof remain inviolate. The General Assembly may provide however, by law, that a verdict may be rendered by not less than five-sixths of the jury in any civil case.

Pennsylvania Consolidated Statutes Annotated, Title 42, § 7533:

> Any person interested under a...written contract...may have determined any question of construction of validity arising under the...contract...and obtain a declaration of rights, status, or other legal relations thereunder.

Pennsylvania Rule of Civil Procedure 1033:

> A party, either by consent of the adverse party or by leave of court, may at any time change the form of action, correct the name of a party or amend his pleading. The amended pleading may avert transactions or occurrences which have happened before or after the filing of the original pleading, even though they give rise to a new cause of action or defense. An amendment may be made to conform the pleading to the evidence offered or admitted.

NOTICE

You have been sued in court. If you wish to defend against the claims set forth in the following pages, you must take action within twenty (20) days after this complaint and notice are served, by entering a written appearance personally or by an attorney and filing in writing with the court your defenses or objections to the claims set forth against you. You are warned that if you fail to do so, the case may proceed without further notice for any money claimed in the complaint or for any other claim or relief requested by the plaintiff. You may lose money or property or other rights important to you.

YOU SHOULD TAKE THIS PAPER TO YOUR LAWYER AT ONCE. IF YOU DO NOT HAVE A LAWYER OR CANNOT AFFORD ONE, GO TO OR TELEPHONE THE OFFICE SET FORTH BELOW TO FIND OUT WHERE YOU CAN GET LEGAL HELP.

Court Administrator
Court of Common Pleas of Clinton County
Clinton County Court House
Lock Haven, PA 17745
(717) 893-4007

S/Allan W. Lugg
Allan W. Lugg #07598
Attorney for Plaintiff

IN THE COURT OF COMMON PLEAS
OF CLINTON COUNTY, PENNSYLVANIA

| | | |
|---|---|---|
| GEISINGER CLINIC, a Pennsylvania non-profit corporation, | : | |
| | : | EQUITY |
| Plaintiff, | : | |
| vs. | : | NO. |
| NICHOLAS W. DICUCCIO, M.D., | : | |
| Defendant. | : | |

AMENDED VERIFIED COMPLAINT IN EQUITY

Introduction

Plaintiff Geisinger Clinic has brought this lawsuit as a result of defendant Dr. Nicholas W. DiCuccio's deliberate, flagrant, and unfair violations of the contracts between him and Geisinger Clinic.

In 1986, Geisinger Clinic acquired the medical practice of Dr. DiCuccio and six other physicians. Dr. DiCuccio personally received $520,447, plus interest, of the purchase price. As an essential part of the

transaction, Dr. DiCuccio entered into an employment agreement (at an initial annual salary of $165,000) under which he agreed, among other things, that for two years after he left the employ of Geisinger Clinic, he would not practice medicine within a 50 mile radius of his Geisinger Clinic office. Geisinger Clinic and Dr. DiCuccio agreed that Geisinger Clinic would waive this restriction only if Dr. DiCuccio repaid Geisinger Clinic his total compensation for the prior twelve months.

Dr. DiCuccio voluntarily left the employ of Geisinger Clinic on February 28, 1990 and immediately began practicing medicine only a few miles from his former Geisinger Clinic office. Nonetheless, he has failed to tender to Geisinger Clinic his compensation for the prior twelve months. Because of that failure and other unfair actions by Dr. DiCuccio, Geisinger Clinic has been forced to bring this lawsuit to enforce its rights.

Parties

1. Plaintiff, Geisinger Clinic ("Geisinger"), is a Pennsylvania not-for-profit corporation with its principal place of business in Danville, Pennsylvania.

2. Defendant, Nicholas W. DiCuccio, ("DiCuccio"), is an individual residing at 6 Hemlock Drive, Lock Haven, Pennsylvania.

Factual Background

3. Geisinger is engaged in the business of providing health care services in Clinton County, Pennsylvania and other areas of Pennsylvania.

4. DiCuccio is a physician who was employed by Geisinger from May 13, 1986 until February 28, 1990. His office during that period was in Mill Hall, Pennsylvania.

5. On May 2, 1986, Geisinger entered into an Asset Purchase Agreement with DiCuccio, six other physicians, and a professional corporation formed by those seven physicians.

6. Under the Asset Purchase Agreement, Geisinger promised to buy the assets of the professional corporation, pursuant to a schedule of payments which has now been completed. DiCuccio personally received $520,446.57, plus interest, of the purchase price.

7. In exchange, pursuant to the terms of the Asset Purchase Agreement, Geisinger acquired the assets of the professional corporation including equipment, inventories, realty, and in particular the goodwill of that corporation. In fact, over 50% of the purchase price paid by Geisinger was on account of the goodwill of the professional corporation.

8. A condition of the Asset Purchase Agreement was that each of the physicians enter into an employment agreement in the form attached as an exhibit to the Asset Purchase Agreement.

9. DiCuccio entered into his Professional Employment Agreement ("Employment Agreement") with Geisinger on the same day that he executed the Asset

Purchase Agreement. (A copy of the executed Employment Agreement is attached hereto as Exhibit A.) He was represented by counsel throughout this transaction.

10. The Employment Agreement sets forth the terms and conditions of DiCuccio's employment. The agreement includes two noncompetition provisions designed to protect Geisinger's investment in the asset purchase as well as the additional investment Geisinger would make in the enhancement and maintenance of Dr. DiCuccio's practice and that of the other physicians. One provision is applicable for two years following the termination of his employment with Geisinger and the other during the term of his employment.

(a) In paragraph 8(a) of the Employment Agreement, DiCuccio promised that for two years following the termination of his employment by Geisinger, he would not practice medicine or obtain clinical privileges at any hospital or healthcare facility

within a fifty mile radius of the principal place where he had his medical office practice as of his termination date.

(b) In paragraph 5(b) of the Employment Agreement, DiCuccio promised to refrain from involvement during the term of the Employment Agreement in any activity competitive with or adverse to Geisinger's business or practice.

11. On January 23, 1990, DiCuccio notified Geisinger by letter that he would be leaving his employment with Geisinger, on February 28, 1990. His last day of employment was February 28, 1990.

12. On February 1, 1990, Dr. Joseph A. Weader, President of Geisinger, wrote a letter to DiCuccio accepting DiCuccio's letter of resignation and reminding DiCuccio of his non-competition obligations in his Employment Agreement.

13. Despite the above letter, and in flagrant violation of paragraph 8 of the Employment Agreement, DiCuccio immediately began the full-time practice of

medicine only a few miles from his former practice with Geisinger. For example, Geisinger has learned that:

(a) DiCuccio has established an office for the practice of medicine on the first floor of the Lock Haven Hospital, 24 Cree Drive, Lock Haven, Pennsylvania, only a few miles from his former office in Mill Hall, Pennsylvania; and

(b) DiCuccio is actively engaged in the practice of medicine at his new office and began treating patients on March 1, 1990, the first day after her terminated his employment from Geisinger.

14. During the term of his Employment Agreement, DiCuccio solicited, encouraged, and planned business competitive with and/or adverse to Geisinger in direct violation of paragraph 5(b) of the Agreement. For example, while he was on Geisinger's payroll, DiCuccio:

(a) advertised in at least one newspaper and otherwise solicited patients, including Geisinger

patients, to undergo future medical treatment by him at facilities other than Geisinger; and

(b) convinced three current Geisinger employees, including a Licensed Practical Nurse in the surgical field, to leave Geisinger and work for him in his new practice.

15. Geisinger expended substantial time, effort, and resources in connection with the Asset Purchase Agreement and in the enhancement and maintenance of DiCuccio's medical practice during his employment by Geisinger. By way of example, Geisinger either provided or paid for DiCuccio's staff, benefits, advertising, public relations, continuing medical education, and legal services. Now that DiCuccio has terminated his employment, Geisinger will have to expend additional time and effort to re-establish the practice which DiCuccio left. In his Employment Agreement, DiCuccio expressly acknowledged that the post-termination noncompetition provision was necessary for precisely

those reasons:

> It is understood that this restriction is necessitated in part because of the time, effort, and resources required by Geisinger in connection with said Asset Purchase Agreement and, otherwise, in the development and maintenance of Physician's practice and in the event that Physician's relationship with Geisinger is terminated, the additional time and effort necessary to re-establish the practice which the Physician leaves. Employment Agreement, ¶8(a).

16. Geisinger is enduring serious burdens, financial and otherwise, as a result of DiCuccio's practice within the restricted geographic area. Geisinger will continue to bear such burdens as long as DiCuccio continues that practice. As DiCuccio acknowledged in paragraph 8(b) of the Employment Agreement, "[i]t is further agreed and understood that . . . the financial burdens Geisinger would endure are difficult to ascertain and quantify..."

17. Paragraph 8(b) of the Employment Agreement provides that Geisinger will waive the restriction on post-termination competition upon payment by DiCuccio of the greater of either $165,000 or

DiCuccio's total compensation paid during the twelve months preceding his termination (the "Waiver Payment"). DiCuccio's total compensation during the twelve months in question was $194,166.62.

18. DiCuccio has knowingly and deliberately established a medical practice in direct competition with Geisinger, squarely within the geographic area prohibited by the Employment Agreement. However, he has not tendered the Waiver Payment to Geisinger.

COUNT I: DECLARATORY JUDGMENT

19. Geisinger incorporates by reference paragraphs 1-18 above.

20. DiCuccio has breached paragraph 8(a) of the Employment Agreement by establishing a practice within the geographically restricted area within the two years following termination of his employment. These breaches are continuing daily.

21. DiCuccio's breaches of paragraph 9(a) of the Employment Agreement have directly and severely

harmed Geisinger and will continue to do so.

22. The parties agreed in paragraph 8(b) of the Employment Agreement that the Waiver Payment is a fair amount to pay as liquidated damages in the event that DiCuccio establishes a medical practice within the geographically restricted area during the two years following termination of his employment. Nonetheless, DiCuccio has been blatantly breaching his noncompetition agreement while refusing to tender the Waiver Payment to Geisinger.

23. The amount of the Waiver Payment is $194,166.62.

WHEREFORE, plaintiff Geisinger respectfully requests that this Court declare that DiCuccio is in breach of his noncompetition agreement, that the parties have agreed to a valid and binding liquidated damages provision to compensate Geisinger in the event of such a breach, and that DiCuccio is therefore obligated to pay Geisinger immediately the amount of $194,166.62 plus

interest and such other relief as this Court may find appropriate.

COUNT II: INJUNCTIVE RELIEF

24. Geisinger incorporates by reference paragraphs 1-23 above.

25. If this Court finds that Geisinger is not entitled to relief under Count I, then, in the alternative, Geisinger is entitled to injunctive relief.

26. DiCuccio's competitive activities after his termination have breached paragraph 8(a) of the Employment Agreement. These breaches are continuing daily.

27. DiCuccio's violations of the noncompetition provisions of the Employment Agreement have directly and irreparably harmed Geisinger and will continue to do so.

28. By his wrongful acts in violation of his Employment Agreement, DiCuccio has intentionally, maliciously and unlawfully interfered with existing and

prospective contractual relationships between Geisinger and its existing and prospective patients and employees.

29. By his improper and unlawful conduct both during and after his employment with Geisinger, DiCuccio has been engaging in unfair competition against Geisinger.

30. Geisinger has no adequate remedy at law.

31. Greater injury would be inflicted on Geisinger by denying its request for injunctive relief than by granting it.

32. The public interest will not be adversely affected by the grant of injunctive relief in that the injunction would not create a shortage of general surgeons in the area in which Dr. DiCuccio practices. On the contrary, there is a surplus of general surgeons in the Clinton County area.

33. Unless and until the injunction is granted, DiCuccio's practice of medicine within the restricted geographic area will wrongfully continue to cause

irreparable harm to Geisinger.

WHEREFORE, plaintiff Geisinger respectfully requests that this Court: (1) enjoin DiCuccio from practicing medicine or obtaining clinical privileges at any hospital or healthcare facility within fifty miles of Mill Hall, Pennsylvania until February 28, 1992; (2) award damages to Geisinger for the harm it has suffered as a result of DiCuccio's wrongful actions; and (3) grant such other relief as this Court finds appropriate.

COUNT III: FRAUD

34. Geisinger incorporates by reference paragraphs 1-11 above.

35. Geisinger provides certain funds for all of its physicians to attend Continuing Medical Education ("CME") courses and conferences. Geisinger encourages its physicians to attend such courses and conferences, which are usually out of town, in order to continue the physicians' medical education and keep them abreast of developments in their fields.

36. Accordingly, Geisinger does not count time spent by its physicians at CME courses and conferences as part of the physicians' vacation entitlement set forth in their Employment Agreements.

37. Paragraph 3 of DiCuccio's Employment Agreement deemed him to have been employed for thirteen years as of May 2, 1986, for purposes of determining staff benefits. His vacation entitlement is set forth in Exhibit B to his Employment Agreement. DiCuccio was entitled to 25 working days of vacation during each of the first two years of his employment with Geisinger and thereafter was entitled to 28 working days of vacation per year.

38. During the term of his employment with Geisinger, DiCuccio took all of the vacation days to which he was entitled under his Employment Agreement. He also took a total of at least several weeks worth of days off in addition to those vacation days, purportedly to attend various CME conferences around the United

States and Canada. At DiCuccio's request, Geisinger paid the tuition for him to attend these conferences.

39. However, preliminary investigation to date reveals that on approximately fourteen occasions during the term of his employment with Geisinger, DiCuccio falsely claimed that he was attending CME conferences when in fact he did not attend them at all. Indeed, on at least one occasion and perhaps on all of the occasions in question, DiCuccio did not even travel to the city where the conference was held. Instead, Di Cuccio was taking extra vacation time to which he was not entitled.

40. For example, preliminary investigation to date reveals that in July of 1988, DiCuccio claimed that he was attending CME courses in South Carolina and New Hampshire, when in fact he was on a safari in Africa.

41. DiCuccio made these claims with the intent of defrauding Geisinger and taking extra vacation time, with pay, to which he was not entitled.

42. Geisinger has been harmed as a result of DiCuccio's fraud. Geisinger paid DiCuccio for days when DiCuccio was in fact not working and was not entitled to vacation. Geisinger was also deprived of the benefit of DiCuccio's services as a full-time physician on those days.

WHEREFORE, plaintiff Geisinger respectfully requests that this Court enter judgment in its favor and against DiCuccio and award compensatory and punitive damages to Geisinger, plus Geisinger's attorneys' fees and such other relief as the Court deems appropriate for the harm Geisinger has suffered as a result of DiCuccio's wrongful actions.

COUNT IV: BREACH OF CONTRACT

43. Geisinger incorporates by reference paragraphs 1-11 and 34-42 above.

44. DiCuccio has breached his Employment Agreement by taking vacation days to which he was not entitled.

45. Geisinger has been harmed as a result of DiCuccio's breach of contract. Geisinger paid DiCuccio for days when DiCuccio was in fact not working and was not entitled to vacation. Geisinger was also deprived of the benefit of DiCuccio's services as a full-time physician on those days.

WHEREFORE, plaintiff Geisinger respectfully requests that this Court enter judgment in its favor and against DiCuccio and award damages to Geisinger, plus Geisinger's attorneys' fees and such other relief as the Court deems appropriate for the harm Geisinger has suffered as a result of DiCuccio's wrongful actions.

COUNT V: BREACH OF CONTRACT
(Competitive Activities During Employment)

46. Geisinger incorporates by reference paragraphs 1-45 above.

47. By his competitive activities during the term of his employment with Geisinger, including but not limited to his solicitation of Geisinger patients and

employees, DiCuccio breached paragraph 5(b) of his Employment Agreement.

48. DiCuccio's actions have directly and severely harmed Geisinger.

WHEREFORE, Geisinger respectfully requests that this Court enter judgment in its favor and against DiCuccio and award damages and such other relief as the Court deems appropriate for the harm Geisinger has suffered as a result of DiCuccio's wrongful actions.

COUNT VI: TORTIOUS INTERFERENCE WITH CONTRACTUAL RELATIONS
(Tortious Interference During Employment)

49. Geisinger incorporates by reference paragraphs 1-48 above.

50. By DiCuccio's competitive activities during the term of his employment with Geisinger, including but not limited to his solicitation of Geisinger patients and employees, DiCuccio intentionally, maliciously and unlawfully interfered with existing and prospective

contractual relationships between Geisinger and its existing and prospective patients and employees.

51. DiCuccio's competitive activities during the term of his employment with Geisinger directly and severely harmed Geisinger.

WHEREFORE, plaintiff Geisinger respectfully requests that this Court enter judgment in its favor and against DiCuccio and award Geisinger compensatory damages, punitive damages, and such other relief as the Court deems appropriate for the harm Geisinger has suffered as a result of DiCuccio's wrongful actions.

COUNT VII: UNFAIR COMPETITION
(During Employment)

52. Geisinger incorporates by reference paragraphs 1-51 above.

53. By DiCuccio's competitive activities during the term of his employment with Geisinger, including but not limited to his solicitation of Geisinger patients and employees, DiCuccio unfairly competed with Geisinger, his own employer.

54. DiCuccio's competitive activities during the term of his employment with Geisinger directly and severely harmed Geisinger.

WHEREFORE, plaintiff Geisinger respectfully requests that this Court enter judgment in its favor and award Geisinger compensatory damages, punitive damages, and such other relief as the Court deems appropriate for the harm Geisinger has suffered as a result of DiCuccio's wrongful actions.

COUNT VIII: BREACH OF FIDUCIARY DUTY AND DUTY OF LOYALTY
(During Employment)

55. Geisinger incorporates by reference paragraphs 1-54 above.

56. During the term of his employment with Geisinger, DiCuccio had a fiduciary duty and duty of loyalty to Geisinger.

57. As a result of his improper conduct, DiCuccio breached his fiduciary duty and duty of loyalty to Geisinger.

58. DiCuccio acted with the purpose and intent of causing harm to Geisinger. He has caused such harm to Geisinger.

WHEREFORE, plaintiff Geisinger respectfully requests that this Court enter judgment in its favor and award Geisinger compensatory damages, punitive damages, and such other relief as the Court deems appropriate for the harm Geisinger has suffered as a result of DiCuccio's wrongful actions.

COUNT IX: INDEMNIFICATION

59. Geisinger incorporates by reference paragraphs 1-58 above.

60. In paragraph 8.3 of the Asset Purchase Agreement, DiCuccio promised to indemnify and hold harmless Geisinger against any damages resulting from any nonfulfillment of any agreement contained in the Asset Purchase Agreement or in connection with the transactions contemplated thereby. DiCuccio has

breached and is continuing to breach the noncompetition agreements contained in his Employment Agreement.

61. Geisinger has suffered damages as a result of DiCuccio's breaches, including the attorneys' fees which Geisinger has incurred.

WHEREFORE, plaintiff Geisinger respectfully requests that this Court enter judgment in its favor and order DiCuccio to pay Geisinger its attorneys' fees and other damages incurred as a result of DiCuccio's breaches of the noncompetition covenants contained in his Employment Agreement.

S/Diane Siegel Danoff
ALAN D. BERKOWITZ (Id No. 32735)
DIANE SIEGEL DANOFF (Id. No. 50644)
Dechert Price & Rhoads
3400 Centre Square West
1500 Market Street
Philadelphia, PA 19102
(215) 981-2000

S/Alan W. Lugg
ALLAN W. LUGG (Id. No. 07598)
Lugg and Lugg
350 East Water Street
Lock Haven, PA 17745
(717) 748-2481

Attorneys for Plaintiff
GEISINGER CLINIC

Dated: March 9, 1960

**Exhibit 5.1.1**

PROFESSIONAL EMPLOYMENT AGREEMENT

THIS PROFESSIONAL EMPLOYMENT AGREEMENT is dated as of 2 May, 1986, between GEISINGER CLINIC, a Pennsylvania nonprofit corporation ("Geisinger"), and Nicholas W. DiCuccio, M.D. ("Physician").

BACKGROUND

Geisinger, Physician, and Physician's current employer, Clinton Association of Physicians and Surgeons, P.C. ("P.C.") have entered into an Asset Purchase Agreement, dated 2 May, 1986, whereby Geisinger shall acquire certain of P.C.'s facilities and assets related to the provisions of health care services in Clinton County, Pa. and adjoining areas (the "CAPS Area").

Geisinger desires to employ Physician upon the consummation of the Asset Purchase Agreement to provide Professional Services on an exclusive basis with Geisinger. It is understood that "Professional Services" as used in this agreement shall mean the licensed practice of medicine as a physician, together with such other related professional activities for which such a license or the holding of the academic degree, "M.D." is customarily necessary or desirable.

NOW THEREFORE, intending to be legally bound, Geisinger and Physician agree as follows:

1. EMPLOYMENT

Geisinger agrees to employ and Physician agrees to accept such employment on an exclusive basis to

render Professional Services.

2. TERM

The term of this Agreement shall commence on 13 May, 1986 and shall continue indefinitely until terminated as provided in paragraph 7.

3. COMPENSATION

(a) Annual Salary - Geisinger agrees to pay Physician an annual salary consisting of a Basic Salary and Additional Compensation, if any, as described in the attached Exhibit A. For the purposes of the "Group Bonus" described in paragraph 2(c) of Exhibit A. Physician shall be considered a member of the separate and distinct group associated with the CAPS Area.

(b) Fringe Benefits - Physician shall be eligible to participate in Geisinger's fringe benefit plans as are available from time to time to all Geisinger employees, together with such other benefits available to Geisinger's professional clinical staff, including professional liability insurance coverage which shall be provided by Geisinger for no less than the extent required by law to be maintained by Physician. A brief summary of the fringe benefits available to Physician is attached as Exhibit B. All compensation shall be subject to the customary withholding taxes and other employment taxes as required.

(c) For the purposes of the following fringe benefit plans and to the extent described below, where benefits are determined as a function of Physician's years of employment with Geisinger, Physician shall be deemed to have been employed as of the date of this Agreement, continuously, on a full-time basis, for Thirteen (13) years:

(i) Retirement Programs

Solely for the purpose of determining Years of Vesting Service pursuant to Section 1.24 and Article IV of the Retirement Plan; and, solely for the purpose of determining the number of Years of Service for vesting pursuant to Article V and Section 1.32 of the Savings Plan (so that, for example, although fully vested, Physician would have accrued no benefit under either Plan as of the date of this Agreement);

(ii) Vacation Program

For all purposes.

It is understood that Exhibit B is only a summary and not a complete statement of benefits available and that the benefits are governed by the terms of various contractual documents with third parties. Accordingly, the provisions of said brochure do not create any contractual rights greater than those which are specified in the various contractual documents or the policies of Geisinger as established from time to time. In any case in which there is a conflict between the provisions of the brochure, and such contractual documents or policies, the contractual documents or policies will govern.

4. EXPENSES

Physician will be reimbursed by Geisinger for reasonable business expenses approved by the person designated by Geisinger as its Senior Vice President Medical Director ("Medical Director") in accordance with Geisinger policies which may be in effect from time to time.

5. PHYSICIAN'S RESPONSIBILITIES

(a) Conduct of Professional Services - Physician shall be responsible for providing Professional Services under the direction of the Medical Director and carrying out all reasonable duties and responsibilities that the Medical Director, or his designee, may assign from time to time. Physician shall be responsible for the provision of full and adequate professional coverage to Geisinger including the maintenance of office appointments, within CAPS Area, operating schedules, hospital rounds and rotations for emergency and on-call availability, as may be required from time to time.

Physician shall continuously maintain an unrestricted license to practice medicine in Pennsylvania and shall at all times comply with the policies, rules and regulations of any and all governmental authorities relating to the licensure and regulation of physicians, and, as applicable, hospitals and the operations of Geisinger. Physician agrees to render Professional Services with the competence, efficiency and fidelity, and shall comply with Geisinger's policies, standards and regulations and with the ethical precepts of his profession.

(b) Exclusive Nature of Professional Services - It is explicitly agreed that Physician shall not engage in the provision of Professional Services during the term of this Agreement except in carrying out his duties hereunder an employee of Geisinger. The following activities shall be permitted only if consented to by Medical Director in writing in advance: the provision of Professional Services outside the terms of this Agreement; or, Physician's involvement in any activity competitive with or adverse to Geisinger's business or practice, either alone, as a partner, joint venturer, contractor or as an officer, director, employee, stockholder (this provision does not preclude Physician from owning without such

prior written consent up to ten percent (10%) of the outstanding stock of any company whose stock is publicly traded) of any other; corporation, partnership, joint venture or other organization or as a trustee, fiduciary or other representative of any such organization.

(c) Disclosure and Divestiture of Other Health Care Interests - In addition to the ongoing obligations of the foregoing paragraph 5(b), Physician represents and warrants that attached hereto as Exhibit C is a full and complete list of all relationships or interests described in said paragraph with such organizations providing health care or health care related products or services, directly or indirectly held by Physician. Physician's spouse or dependents, as of the date of the Agreement, together with the agreement of the parties with respect to the terms and conditions for the divestiture of such relationships or interests.

6. ASSIGNMENT OF REVENUES

Physician assigns to Geisinger, as a condition of employment, all revenues, fees or other remuneration attributable to services provided to patients or otherwise from the provision of Professional Services, including fees or honoraria for lectures, teaching, professional papers and the like. Physician agrees that only Geisinger shall render to the appropriate parties all bills for the provision of Professional Services.

7. TERMINATION

(a) Either party may at any time terminate this Agreement upon thirty (30) days prior written notice to the other. Geisinger may, with prior written notice, terminate this Agreement at any time for just cause, including, but not limited to, Physician's breach of or failure to perform any material term, condition or

responsibility contained in this Agreement. Prior to any termination initiated by Geisinger, fair or without cause, however, Physician shall be afforded an opportunity for a review of the underlying circumstances therefor, pursuant to Geisinger's published guidelines governing such reviews, as amended and in effect from time to time. Physician acknowledges receipt of a copy of such guidelines certified by an officer of Geisinger as being in effect as of the date of this Agreement. Geisinger agrees that any amendments to such guidelines shall be of general applicability among Geisinger's professional clinical staff.

(b) Physician understands and agrees that (i) his resignation or his other voluntary termination of this Agreement, or (ii) the termination of this Agreement initiated by Geisinger for cause, may result in a reduction of the amounts payable to Physician and other Sellers pursuant to the terms of the aforementioned Asset Purchase Agreement (without limitation to any other remedies at law or in equity Geisinger may assert, including the provisions of the following paragraph 8). It is understood that, solely for the purposes of this Paragraph 7(b), the phrase "termination" shall not include Physician's death, the circumstances described in subparagraph (c) below, incurrence of a disabling illness or injury which substantially interferes with his ability to carry out his duties hereunder or the release from employment, initiated by Geisinger without cause.

(c) This Agreement is automatically terminated upon Physician's attainment of the age of seventy years.

8. NONCOMPETITION

(a) It is understood and agreed that Physician shall not, following termination of employment, directly or indirectly, enter into the practice of medicine, as an

individual, as a partner or joint venturer, as employee or agent for any person or organization, or obtain clinical privileges at any hospital or healthcare facility within the restricted area described by a radius of fifty (50) miles from such medical office facility designated as the principal site of physician's medical office practice at the time of such termination. This restriction shall endure for a period of two years from the date of termination of this Agreement and regardless of the grounds, if any, therefor. It is understood that this restriction is necessitated in part because of the time, effort, and resources required by Geisinger in connection with said Asset Purchase Agreement and, otherwise, in the development and maintenance of Physician's practice and in the event that Physician's relationship with Geisinger is terminated, the additional time and effort necessary to re-establish the practice which the Physician leaves. In the event the provisions of this section are deemed to exceed the time, geographic, or occupational limitations permitted by applicable law, then such provisions shall be automatically reformed to the maximum time, geographic, or occupational limitation permitted by applicable law.

(b) If Physician desires to establish a practice within the restricted area during the two-year period following termination, Geisinger will waive this restriction upon the payment to it of a sum (the "Waiver Payment"), the amount of which shall be the greater of either: (i) One Hundred Sixty Five Thousand ($165,000) Dollars; or (ii) the total compensation paid Physician during the 12 calendar months preceding the month in which the termination occurred. It is further agreed and understood that because the financial burdens Geisinger would endure are difficult to ascertain and quantify, the amount

of the Waiver Payment is a fair amount to pay as liquidated damages, and not as a penalty, in the event Physician desires to establish a practice within the restricted area during the two-year period.

9. AMENDMENT

This Agreement may be amended only in writing executed by the parties and, in the case of Geisinger, the same officer authorized to receive notice as provided in the following paragraph 10.

10. NOTICE

Any notice under this Agreement shall be given in writing and sent either by hand delivery or by registered or certified mail addressed, in the case of Geisinger, to:

Geisinger Clinic (30-22)
North Academy Avenue
Danville, PA 17822

Attention: Senior Vice President and Medical Director

with a required copy to:

Geisinger System Services (22-03)
Department of Legal Services
Danville, PA 17822

in the case of Physician to:

Nicholas W. Dicuccio, M.D.
P.O. Box 181
Mill Hall, PA 17751

with a required copy to:

Beck and Anders Law Associates, Inc.
400 GSB Building
One Belmont Avenue
Bala Cynwyd, PA 19004

Attention: Mark Kropiewnicki, Esq.

11. ENTIRE AGREEMENT

This Agreement represents the entire agreement between Geisinger and Physician and supersedes all prior agreements and understandings with respect thereto. This Agreement supersedes prior employment agreements with P.C. and Physician hereby waives all claims and releases P.C. from any and all obligations under such prior employment agreements.

12. PARTIES BOUND: ASSIGNMENT

This Agreement shall inure to the benefit of and shall be binding upon the respective successors and assigns of the parties hereto, but it may not be assigned in whole or in part by either party without the prior written consent of the other.

13. GOVERNING LAW

This Agreement shall be governed by the laws of the Commonwealth of Pennsylvania.

14. SEVERABILITY

In the event that any provision hereof be adjudged to any extent invalid, illegal or unenforceable in any respect, such invalidity, illegality or unenforceability shall not affect any other provision hereof and this Agreement

shall be construed as if such invalid, illegal or unenforceable provision had never been contained herein.

15. WAIVER OF BREACH

The waiver by either party of a breach or violation of any provision of this Agreement shall not operate as, or be construed to be, a waiver of any subsequent breach of the same or other provision hereof.

IN WITNESS WHEREOF, the parties hereto executed this Agreement, to be effective as of the date first written above.

| "PHYSICIAN" | GEISINGER CLINIC |
|---|---|
| S/Nicholas W. Dicuccio, M.D. | S/Henry Hood M.D. |
| Nicholas W. Dicuccio, M.D. | By: Henry Hood, M.D.<br>Its: President |

EXHIBIT A

GEISINGER CLINIC COMPENSATION PROGRAM

The Geisinger Clinic Compensation Plan, applicable to all of the Clinic's clinical professional staff, has four potential layers of salary compensation that can be applied flexibly to a particular group's needs and goals. We recognize the importance of compensation programs and the need for such programs to be consistent with group goals and management priorities. We believe our compensation program provides the flexibility to adapt to the needs of different groups at the present time. The following is intended to be generally descriptive of the Plan, however, it is understood that the specific provisions of the Plan documents, as amended from time to time, shall prevail in the event of any conflict. The four layers are as follows:

1. Basic Salary: A predictable salary paid monthly, and reviewed annually. Physician's Basic Salary shall be One Hundred Sixty Five Thousand ($165,000) Dollars initially. Physician's Basic Salary shall not be reduced, during the term of the Agreement to which this Exhibit A is attached, provided: (i) Physician shall maintain levels of financial productivity (determined in terms of revenues derived and collected for Professional Services) and patient accessibility (determined in terms of Physician's presence and availability for the provision of Professional Services to in and outpatients in clinic, hospital, or other applicable settings) substantially consistent with such levels as existed prior to the execution of this Agreement; and (ii) if, after June 30, 1987 the excess of net revenues over expenses for the Clinic's fiscal year immediately preceding does not fall below the eight percent (8%) of the net revenues budgeted for the CAPS' division of Geisinger Clinic.

2. Additional Compensation

A. Percentage of Net Revenue: Provides a mechanism for Doctors Dicuccio, Dolan, Greenberg, Lytle, and Thomas to exceed their basic salary amount if aggregate collected revenues for professional services for Doctors Dicuccio, Dolan, Greenberg, Lytle, and Thomas multiplied by a specific percentage exceeds their aggregate basic salary. Payments are made quarterly with a holdback that is reconciled in July for the preceding year. The applicable current percentage for the group of Doctors Dicuccio, Dolan, Greenberg, Lytle, and Thomas is 44.5 percent of aggregate net professional revenue. This percentage shall be reviewed, and may be adjusted on an annual basis.

B. Medical Director's Fund: An amount equal to 1% of net revenue may be allocated to a fund on an annual basis for the distribution of bonuses by the medical director on a discretionary basis to recognize and reward contributions to the group that are non-revenue generating in nature.

C. Group Bonus: An amount up to forty percent (40%) of a group's net revenues in excess of budget may be available for bonuses to group members as long as expenses are at or below budget and income goals are attained.

EXHIBIT B

STAFF BENEFITS AT GEISINGER

| | Yearly Cost to Employer | Yearly Cost to Individual | Provider |
|---|---|---|---|
| DISABILITY INCOME | | | |
| Full salary for the first six months of any total disability | Depends on | No cost | Geisinger |
| Should disability persist beyond six months, 2/3 of salary to a maximum benefit of $15,000 per month (integrated with social security and workers compensation | Depends on | No cost Salary | Paul Revere |
| HEALTH INSURANCE | | | |
| The Geisinger Health Plan, a comprehensive prepaid "HMO," provides coverage for you and your dependents. An alternate choice is Blue Cross/Blue Shield/Major Medical coverage for you and your dependents that pay the usual customary and reasonable (UCR) (UCR) charges | Up to $1,878 | $114 for GAP (Family Coverage) $48 for BC/BS/MM | Geisinger Blue/Cross Blue Shield |

| | Yearly Cost to Employer | Yearly Cost to Individual | Provider |
|---|---|---|---|
| Supplemental health insurance after HMO insurance is exhausted. After a $100 out-of-pocket deductible per member, the program pays 80% of the next $3,000 of covered charges and 100% thereafter without limitation | Varies with Usage | No Cost ($100 Deductible) | Geisinger |
| DENTAL CARE | | | |
| 50% coverage on all dental services (excluding orthodontic and cosmetic procedures for self and dependents | Varies with Usage | Varies with Usage | Geisinger |
| LIFE INSURANCE | | | |
| In case of your death active service, an amount equal to two months' salary to your spouse | Varies with Salary | No Cost | Geisinger |

| | Yearly Cost to Employer | Yearly Cost to Individual | Provider |
|---|---|---|---|
| Group life and accidental death insurance, amount varying with salary, but $125,000 at salaries above $50,000. (The value of insurance above $50,000 is imputed income for tax purposes).<br><br>You may purchase an equal amount of insurance at your own expense. | $203 for $125,000 | Same as employer rate for matching insurance | Hartford |
| Travel insurance policy providing accidental death benefits of $500,000 plus medical coverage up to $5,000. This policy covers you when you travel on official Geisinger business other than to/from your regular work location. | Approx. $25 | No cost | I.N.A. |

| | Yearly Cost to Employer | Yearly Cost to Individual | Provider |
|---|---|---|---|
| **LIABILITY INSURANCE** | | | |
| Professional liability (medical malpractice) insurance. Extended coverage under the Catastrophic Loss Fund administered by the Commonwealth of Pennsylvania | Varies<br><br>Varies by Specialty | No cost<br><br>No cost | Geisinger<br><br>Common-wealth of PA |
| Reimbursement for any deductible and/or increase in premium (for up to three years) resulting as a direct consequence of any accident involving your personal car while traveling on Geisinger Business. Documentation is filed with the Medical Director's office. | Varies | No Cost | Geisinger |

| | Yearly Cost to Employer | Yearly Cost to Individual | Provider |
|---|---|---|---|
| **RETIREMENT INCOME** | | | |
| Retirement Plan paying $10 per month at age 65 for each year of service ($15 per month for years prior to 1980). | $213 | No Cost | Northeast Bank of PA |
| Retirement savings plan matching your contributions with 2-1/2%, 5% and 7%. 50% vesting after 5 years of service and 100% vesting after 10 years, or at death. Actuaries estimate that these plans, plus Social Security benefits, will afford a retirement income equal to 100% of average annual lifetime earnings after 30 years of credited service. | Up to 6% of salary plus SS contrib. | 2% of the first 50% of SS earn.<br>4% up to 90% of SS wage base. 6% of remaining salary | New England Life<br>New England Life |

| | Yearly Cost to Employer | Yearly Cost to Individual | Provider |
|---|---|---|---|
| Fixed or variable tax deferred annuity programs. A portion of one's salary may be regularly deducted from each paycheck and invested. Amounts so withheld are not subject to Federal Income Tax until payout is received.<br><br>Payout is at the discretion of staff member and subject only to tax consequences. | No Cost | Voluntary Amounts Controlled by IRS Limitation | New England Life<br>Lincoln National Pension |
| Deferred compensation available so that you may defer payment of a portion of your salary until a fixed future date (normally after you cease work). There is no limit on amount of salary that can be deferred. | | | |

| | Yearly Cost to Employer | Yearly Cost to Individual | Provider |
|---|---|---|---|
| VACATION SCHEDULE | | | |
| Vacation time based on length of service: | Depends on Salary | No cost | Geisinger |
| 1-10 years -20 working days 10-15 years -25 working days 15-25 years -28 working days | | | |
| After 25 years or upon reaching age 55 with 15 years service -33 working days | | | |
| CONTINUING EDUCATION | | | |
| Continuing education up to 20 days annually; reimbursement for attendance at national or specialty meetings, clinic trips, special education trips, etc. Reimbursement | Value of lost services | Any balance | Geisinger |

| | Yearly Cost to Employer | Yearly Cost to Individual | Provider |
|---|---|---|---|
| includes documented travel expense, single hotel room and meals. Maximum annual reimbursement is is $2,800, including tuition or registration costs. This limitation does not apply if the staff member is a listed participant on the program of the meeting. Unused funding up to a maximum of $800 may be carried over to the next fiscal year. Up to $1,000 usable for specialty dues and professional publications. | Up to $2,800 | | |
| LOAN GUARANTEE | | | |
| Loan guarantee up to $15,000 for down payment on a home. This loan is repayable over five years. | No Cost | Prevailing Interest Rate | Your Bank |

| | Yearly Cost to Employer | Yearly Cost to Individual | Provider |
|---|---|---|---|
| MOVING EXPENSE | | | |
| Actual cost of moving household goods and reimbursement for temporary storage of household furnishings. Advance house-hunting trip of three days for staff member and spouse is provided. | Varies | No Cost | Geisinger |
| ASSOCIATION DUES | | | |
| Membership in the county and state Medical Societies Association. | $615 | No Cost | Geisinger |

* Physician shall be entitled to all of the above benefits immediately upon entrance into an employment status with Geisinger Clinic

## Exhibit C

Disclosure and Divestiture of
Other Health Care Interests

AFFIDAVIT

AMENDED VERIFIED COMPLAINT IN EQUITY

Commonwealth of Pennsylvania :
ss. :
County of Clinton :

Joseph A. Weader, M.D., being duly sworn according to law, deposes and says that he is President of Geisinger Clinic; that he is authorized to make this affidavit on behalf of Geisinger Clinic; and that the facts set forth in the foregoing verified complaint are true and correct to the best of his knowledge, information and belief.

S/Joseph A. Weader, M.D.
Joseph A. Weader, M.D.

Sworn to and subscribed

before me this 6th day

of March 1990
Pamela L. Gurrmot
Notary Public

CERTIFICATE OF SERVICE

Diane Siegel Danoff, an attorney, hereby certifies that on March 9, 1990, she caused to be served a copy of the Amended Verified Complaint in Equity on Robert A. Butler, Esq., 50 West Broad Street, Columbus, Ohio 43215 and Richard N. Saxton, Jr., Esq., 138 East Water Street, Lock Haven, PA 17745, by hand delivery.

s/Diane Siegel Danoff
Diane Siegel Danoff

# ASSET PURCHASE AGREEMENT

THIS IS AN ASSET PURCHASE AGREEMENT, dated _____, by and between CLINTON ASSOCIATION OF PHYSICIANS AND SURGEONS, P.C., a Pennsylvania professional corporation ("Seller"), BARRY L. BENDER, M.D., JOHN B. COVELL, M.D., NICHOLAS W. DICUCCIO, M.D., JAMES J. DOLAN, III, M.D., MICHAEL R. GREENBERG, M.D., LARRY H. LYTLE, M.D. AND DAVID W. THOMAS, M.D., the sole shareholders of Seller (collectively, the "Shareholders"), and GEISINGER CLINIC, a Pennsylvania non-profit corporation ("Purchaser").

## BACKGROUND

A. Purchaser employs physicians, nurses and other health care professionals who provide health care services in Pennsylvania.

B. Seller employs the Shareholders, additional physicians Keith Adams, M.D., Bruce M. Bilder, M.D., M. Joan Bilder, M.D., Frank L. Conly, M.D., Leroy C. Moore, M.D., Thomas P. Rodgers, M.D., and Victoria J. Romeo, M.D., nurses, and other individuals to provide health care services in Clinton County, Pennsylvania and the surrounding areas (Shareholders and such additional physicians may hereinafter be referred to as "Physicians").

C. Seller owns certain real estate and operates facilities located thereon at R.D. #3, Route 54, Mill Hall, PA ("the Mill Hall Real Estate"), and 955 Bellefonte Avenue, Lock Haven, PA ("the Lock Haven Real Estate"),

which facilities are used for the provision of health care services.

D. Seller leases and operates facilities at 924 Huron Avenue, Renovo, PA ("the Renovo Facility"), and the Avis Medical Center, Suite 3, Central Avenue, Avis, PA ("the Avis Facility"); which facilities are used for the provision of health care services.

E. Purchaser wishes to secure the professional services of Physicians and each Physician desires to render such services under employment agreements entered into pursuant to the terms of this Agreement.

F. Purchase wishes to employ certain personnel currently in Seller's employ in support of Physicians' medical practices.

G. Purchaser wishes to purchase, and Seller wishes to sell to Purchaser, certain assets utilized by Physicians in connection with and related to their medical practices. In addition, Purchaser wishes to acquire the Mill Hall and Lock Haven Real Estate and to assume the leases of the Avis and Renovo Facilities.

NOW, THEREFORE, intending to be legally bound hereby, the parties agree as follows:

1. THE TRANSACTION.

1.1 Sale and Purchase of Assets. At the Closing Seller will sell and Purchaser will purchase the following assets ("the Assets"), such sale to be made free and clear of all liabilities, security interests, liens, claims, and encumbrances except for those liabilities and obligations which are to be assumed by Purchaser pursuant to Section 1.3 below:

(a) All of the equipment, fixtures, furnishings and other assets described in Exhibit 1.1(a), which has been delivered to purchaser on this date;

(b) All of the accounts receivable of Seller and arising out of Physicians' medical practice which are outstanding on the Closing date ("Accounts Receivable");

(c) All supplies and inventories of any kind and description of Seller existing on the Closing date, including but not limited to drugs and medical, surgical, radiological, laboratory, and office supplies;

(d) All right, title and interest of Seller in, under, and to the leases, contracts, and agreements described in Exhibit 1.1(d);

(e) All files, books, records, and medical histories pertaining to Seller's business, and other related data pertaining to the medical practice and patients of Physicians, subject to the rights therein of such patients;

(f) All of Seller's rights under all licenses, permits and other authorizations necessary or useful in conducting and operating Seller's facilities and business;

(g) All deposits and prepayments received from patients and others as of the Closing date, net of any credits, relating to services to be provided after the Closing date;

(h) The Mill Hall Real Estate, as more fully described in Exhibit 1.1(h);

(i) The Lock Haven Real Estate, as more fully described in Exhibit 1.1 (i);

(j) A 1986 Jeep Wagoneer automobile; and

(k) All goodwill and other assets of Seller as of the Closing date, including but not limited to those assets purchased or otherwise acquired by Seller between the date of this Agreement and Closing, but excluding those assets specifically excluded in Section 1.2 below.

1.2 Excluded Assets. Excluded from the Assets sold and purchased under this Agreement are the following:

(a) All of Seller's other automobiles;

(b) Seller's corporate minute books, stock register and related records; and

(c) All cash and securities held by Seller on the Closing date.

1.3 Liabilities Assumed. At the Closing, Purchaser will assume those liabilities described in the schedule of Assumed Liabilities attached hereto as Exhibit 1.3, but only to the extent that such liabilities are in amounts consistent with an independent audit of the condition of Seller's liabilities as of October 31, 1985, to be conducted by the firm of Parente, Randolph, Orlando, Carey and Associates within 120 days of the Closing date (the "Post Closing Audit"), and, are reduced by any amounts to become payable or due subsequent to October 31, 1985 and on or before the Closing date (the "Audited Adjusted Assumed Liabilities Amount"). Under no circumstances shall the Audited Adjusted Assumed Liabilities Amount exceed $1,250,085.

The Purchaser will also assume Seller's current accounts payable in such amount as shall be reflected on

a balance sheet as "CURRENT LIABILITIES - Accounts Payable", as of the Closing date, which shall also be reported in the Post Closing Audit (the "Audited Accounts Payable Amount").

The Purchaser will assume no other liabilities in connection with the transaction.

1.4 Purchase Price. The aggregate purchase price for the Assets (the "Purchase Price") will be Two Million Nine Hundred Thousand ($2,900,000 ) Dollars, to be allocated among the assets as set forth in Exhibit 1.4, and payable as follows:

(a) Seven Hundred Thousand ($700,000) Dollars shall be payable in check at the Closing;

(b) The balance of the Purchase Price, shall be reduced by: (i) the amount, if any, by which Audited Accounts Payable Amount exceeds $175,000; and (ii) the amount, if any, by which the assumed liabilities described in Exhibit 1.3 exceed the Audited Adjusted Assumed Liabilities Amount, and shall be known as the"Adjusted Balance."

(c) The payment of the full amount of the Adjusted Balance is expressly contingent upon the continued employment of the Shareholders pursuant to their respective Professional Employment Agreements with the Geisinger Clinic. If on or before January 2, 1990, a Shareholder's employment with the Geisinger Clinic, is terminated pursuant to the provisions of paragraph 7(b) of said Professional Employment Agreement, the amount then unpaid to Sellers shall be reduced by the proportionate Shareholder interest held by such terminating Shareholder and set forth in Exhibit 1.4(c). For this purpose the phrase "termination" shall not include: (i) Shareholder's death; or (ii) incurrence of a

disabling illness or injury which substantially interferes with his ability to carry out his duties hereunder; (iii) Geisinger Clinic's termination of Shareholder without cause; or, (iv) termination resulting from Shareholder's attainment of the age of seventy (70) years. In the event that the Adjusted Balance has already been reduced due to prior termination of employment of one or more shareholders, upon the subsequent termination of employment by any other Shareholder, the amount due shall be further reduced by an amount equal to the proportionate share of the original total which would have been unpaid if all seven Shareholders remained employed at such date.

(d) The Adjusted Balance shall be paid in four equal annual installments on January 2, 1987, January 2, 1988, January 2, 1989, January 2, 1990, unless reduced by circumstances as addressed in Section 1.4(c) above. Interest on the amount of the Adjusted Balance remaining due and unpaid shall accompany each installment payment. Interest shall be computed and fixed at the lowest applicable Federal rate in effect as of the date of Closing pursuant to Internal Revenue Code Section 1274(d), assuming semi-annual compounding or its equivalent, as of Closing date.

1.5 Closing. The Closing under this Agreement will be held on May 12, 1986, at 4:00 p.m. in the offices of Purchaser, Danville, Pennsylvania, or at such other location, date, and time as shall have been agreed upon in writing by the parties. At the Closing:

(a) Seller will deliver to Purchaser such instruments of conveyance as shall in the opinion of Purchaser's counsel be effective to vest in Purchaser good and marketable title to the Assets; and

(b) Purchaser will deliver to Seller its check for Seven Hundred Thousand ($700,000) Dollars and a note for the balance of Two Million Two Hundred Thousand ($2,200.000) Dollars, or such lesser balance as exists pursuant to Section 1.4(b) and/or (c) herein, in the form of the note attached hereto as Exhibit 1.5(b), payable to the order of Seller.

2. Representations and Warranties by Seller and Shareholders. Seller and Shareholders jointly and severally represent and warrant to Purchaser as follows:

2.1 Corporate Matters. Seller is a corporation duly organized validly existing and in good standing under the laws of Pennsylvania, and Seller has taken all corporate and shareholder action necessary to consummate the transactions contemplated by this Agreement.

The copies of Seller's Articles of Incorporation and Bylaws, as amended and attached hereto as Exhibit 2.1, which have been certified by Seller's Secretary and delivered to Purchaser, are correct and complete as of the date of this Agreement. Neither the execution of this Agreement nor the consummation of the transactions contemplated hereby will violate any provision of Seller's Articles of Incorporation or Bylaws.

2.2 Validity and Enforceability. This Agreement and all other documents, instruments and agreements executed by Seller and Shareholders in connection herewith constitute or shall constitute valid and binding obligations of Seller and Shareholders enforceable against them and each of them according to its terms.

2.3 Title to Assets. Except as set forth in Exhibit 2.3, Seller has as of the date hereof, the power

and authority to convey to Purchaser, and will convey and transfer to Purchaser as of the Closing date, good and marketable fee title to all of the Assets (and, in the case of the Real Property, such title as will be insured at regular rates by a title insurance company acceptable to Purchaser), subject to no mortgage, pledge, lien, charge, assignment, easement, restriction, claim, conditional or other sale agreement, option, encumbrance or security interest.

2.4 Liabilities. Except as shown in Exhibit 2.4, Seller has no liabilities, absolute or contingent, which are not shown or provided for, or are in excess of the amounts shown or provided for, other than the liabilities to be assumed pursuant to Section 1.3 above. Purchaser will not at any time suffer any liability with respect to any liabilities of Seller not provided for in Section 1.3 above. Seller and its Shareholders agree to indemnify Purchaser and hold Purchaser free and harmless from and reimburse Purchaser for and in respect of any loss, costs, expense, liability or damages arising out of or resulting from any liabilities of Seller not fully and explicitly described, or in excess of the amount specified in Section 1.3, subject to the limits of Section 8.3 below.

2.5 Litigation. There is no order, litigation, proceeding or investigation by or before any court or other governmental body pending or, to the knowledge of Seller, threatened against or affecting Seller, the Shareholders or the Assets, whether or not fully covered by insurance, the outcome of which may materially and adversely affect the ability of Seller to perform its obligations hereunder or to consummate the transaction contemplated hereby, including, without limitation such matrimonial actions as provided in the Pennsylvania Divorce Law (23 P.S. 403(d)). Furthermore, there is no order, litigation, proceeding or investigation by or before

any court or other governmental body pending or, to the knowledge of Seller, threatened against or affecting Seller, Shareholders, Physicians, or the Assets, whether or not fully covered by insurance, except as shown in Exhibit 2.5 hereto

2.6 Contracts. Seller does not have any presently existing lease, contract or commitment of any kind, oral or written, affecting or related to the Assets except those listed in Exhibit 1.1(d) ("Contracts"). Each of the Contracts is a valid and legally binding obligation of Seller and is enforceable by Seller in accordance with its terms. Except as indicated in Schedule 1.1(d) each Contract may not be assigned without the consent or approval of any party to such Contract or of any governmental authority. Neither Seller nor any part to any Contract is in default under any provision thereof, and no event has occurred which, but for the giving of notice or the passage of time, would constitute a default thereunder. Neither the execution of this Agreement nor the consummation of the transactions contemplated hereby will violate or result in a breach of, or constitute a default under, any Contract or any other agreement, lease, covenant or instrument to which Seller is a party or by which Seller or any of its assets are bound.

2.7 Patents and Trademarks. Seller has no patents, patent applications, trademarks or tradenames other than the tradenames "Clinton Association of Physicians and Surgeons" and "CAPS."

2.8 Insurance. Exhibit 2.8 contains a list of all insurance policies held by Seller and Physicians' professional liability insurance policies, showing in each case, the name of the carrier, the policy number, the amount of coverage, the perils covered, the limits on liability and the expiration date.

2.9 Labor. None of Seller's employees is a member of a collective bargaining unit and Seller is not a party to any labor contract or dispute.

2.10 Brokers. Neither Seller nor any Shareholder has made any agreement or taken any action which may cause anyone to become entitled to a commission in connection with this transaction, or would cause Purchaser to be obligated to pay a finder's fee to anyone in connection with this transaction.

2.11 Tax Matters.

(a) To the best of Seller and Shareholders' knowledge, Seller has timely filed all requisite federal, state, local, foreign and other governmental income, payroll, excise, capital stock, sales and use, license, personal property, real estate, franchise, estimated tax and other tax reports or returns required to be filed and has timely paid all taxes, interest and penalties shown as due thereon and assessments received. To the best of Seller and Shareholders' knowledge, each such return is true and correct in all material respects. Except as disclosed in Exhibit 2.11, the Internal Revenue Service has never audited the federal income tax return of Seller. There ar no outstanding agreements, waivers or consents to extend periods during which additional tax assessments may be made.

(b) Seller has not filed any consent or agreement under Section 341(f) of the Internal Revenue Code and has never joined in the filing of a consolidated federal income tax return.

(c) Seller has not entered into a closing agreement or similar binding agreement with any taxing authority that would affect its tax liability or that of its successors for any taxable period.

(d) Seller has delivered to the Purchaser true and complete copies of federal and state income tax returns of Seller filed with respect to its last five tax years, attached as Exhibits 2.11(d).

(e) Purchaser will not at any time suffer any liability with respect to any taxes, interest or penalties due, or arising from any event, action or failure to act occurring, prior to the Closing date, and Seller and its Shareholders agree, subject to the limitations of Section 8.3 hereof, to indemnify Purchaser and hold Purchaser free and harmless from and reimburse Purchaser for and in respect of any such tax, interest or penalty.

2.12 Real Property. Exhibits 1.1(h) and 1.1(i) contain correct summary descriptions of the real estate to be acquired hereunder together with the buildings, structures, and improvements thereon (the "Real Property"). The Sellers have delivered to the Purchaser true and complete copies of all title insurance reports, commitments and policies on the Real Property, and true and complete copies of all leases and other agreements with respect to Real Property. All known deficiencies or exceptions as to the good operating condition of the Real Property are listed in Exhibit 2.12. To the best of Seller and Shareholders' knowledge, the construction, physical plant, use and operation by Seller of the Real Property conform to all applicable building, zoning, subdivision and use, environmental, safety and other laws, codes, ordinances, regulations, permits, licenses and certificates and all restrictions and conditions affecting title. The Real Property has had issued and fully paid every permit, certificate, authorization and other grant of authority from each governmental agency having jurisdiction over, and from each utility serving, such Real Property necessary for such facility and its present use, and all such grants are

current and in full force and effect. There has been no notice of violation received with respect to the Real Property which remains uncured.

2.13 Governmental Consents. No consent by, approval or authorization of or filing, registration or qualification with any governmental authority is required for the negotiation, execution, delivery or performance of this Agreement by Seller or its Shareholders or in connection with the consummation by the Seller or its Shareholders of the transactions contemplated hereunder.

2.14 Compliance with Laws. All corporate actions required by law have been taken by Seller, and all reports and returns required to be filed by Seller have been filed except for actions, reports and returns, if any, where the failure to take such action or file such reports or returns cannot result in the imposition of any material penalty or liability for such failure. Neither the execution and delivery of this Agreement nor compliance with its terms and conditions on the part of Seller will constitute a violation of any statute or regulation applicable to Seller. Seller has all governmental permits, licenses, certificates of inspection and other authorizations necessary to conduct its operations, and each Physician employed by Seller has all licenses and other authorizations necessary to conduct his present practice. To the best of Shareholder's and Seller's knowledge, Seller has duly complied with, and its facilities and equipment are in substantial compliance with, all applicable state and local laws and ordinances, including all orders, notices, rules, regulations and standards relating thereto. Seller has no outstanding citations, penalties, unsatisfied abatement obligations or notices or orders of non-compliance issued by any federal, state or local agency in respect of safety or health.

2.15 Pension and Other Plans. Except as shown in Exhibit 2.15 hereto, Seller is not a party to any pension, retirement, stock option, bonus, vacation or other employee benefit plan and has no agreements, plans or practices with respect to severance pay, retirement, vacation or other employee benefits.

To the best of Seller and Shareholders' knowledge, Seller is in compliance in all material respects with the applicable provisions of the Employment Retirement Income Security Act of 1974, as amended ("ERISA"). The only employee pension benefit plans (as defined in Section 3(2) of ERISA) maintained by Seller are the Clinton Association of Physicians and Surgeons, P.C. Pension Plan and the Clinton Association of Physicians and Surgeons, P.C., Profit-Sharing Plan (the "Plans"), true and complete copies of which have been furnished to Purchaser. To the best of Seller and Shareholders' knowledge, Seller has made all contributions to the Plans which it may have been required to make in accordance with the Plans, and has filed all reports, returns and similar documents with respect to the Plans required by any government agency. The Plans have received from the Internal Revenue Service determination letters dated December 15, 1977 and December 15, 1977, respectively to the effect that the Plans are qualified as exempt from tax under sections 401(a) and 501(a), respectively, of the Internal Revenue Code, which letters have neither been nor threatened to be revoked. Purchaser shall not, by virtue of the consummation of the transactions contemplated by this Agreement, be liable for making any contributions to or payments on account of the Plans.

3. Representations and Warranties by Purchaser. Purchaser represents and warrants to Seller as follows:

3.1 Corporate Matters. Purchaser is a corporation duly organized, validly existing and in good standing under the laws of Pennsylvania, and Purchaser has taken all corporate action necessary to consummate the transactions contemplated by this Agreement.

3.2 Validity and Enforceability. This Agreement and all other documents, instruments and agreements executed by Purchaser in connection herewith constitute and shall constitute valid and binding obligations of Purchaser enforceable against Purchaser according to its terms.

3.3 Brokers. Purchaser has not made any agreement or taken any action which may cause anyone to become entitled to a commission in connection with this transaction.

3.4 Governmental Consents. To the best of Purchaser's knowledge, no consent by, approval or authorization of or filing, registration or qualification with any governmental authority is required for by negotiation, execution, delivery or performance of this Agreement of Purchaser or in connection with the consummation by Purchaser of the transactions contemplated hereunder.

3.5 Compliance With Laws. Neither the execution and delivery of this Agreement nor compliance with its terms and conditions on the part of Purchaser will constitute a violation of any statute or regulation applicable to Purchaser.

4. Obligations of Seller. Seller and, where indicated the shareholders, agree as follows:

4.1 Further Assurance. At Seller's and Purchaser's joint expense, at or after Closing, Seller will execute and deliver such further instruments of transfer

and take such other action as Purchaser may reasonably request in order to more effectively transfer the Assets to Purchaser.

4.2 Assignments of Contracts. Prior to the Closing Seller will obtain any consents to the assignment of any Contract for which consent is required by the terms thereof or by law as a result of the transaction contemplated hereby, and will deliver an executed copy of each such assignment to Purchaser.

4.3 Compliance with Statutes. Seller will duly comply with all applicable laws with which it is required to comply in order to validly complete the transaction provided for in this Agreement and all such other laws as might, on failure of compliance therewith, impose any liability upon Purchaser for Seller's debts and obligations (except for the Assumed Liabilities). Seller will indemnify and save Purchaser harmless from and against any loss, liability or expense incurred because of Seller's failure to comply with any such laws, subject to the limits provided in Section 8.3 below.

4.4 Right of Inspection. Prior to the Closing Seller shall provide Purchaser and its representatives with full access during regular business hours to inspect all books, records and premises relating to Seller's operations and the Physicians' medical practices and shall furnish Purchaser with all such documents and information as Purchaser may reasonably request, including, but not limited to, copies of documents and records described in Section 1.2(b).

4.5 Representations and Warranties. Seller will not take or omit to take any action which would result in the inaccuracy at Closing of any of the representations and warranties contained in Section 2 of this Agreement.

4.6 Management of Business Prior to Closing. Prior to the Closing:

(a) Seller's operations and the Physicians' medical practice will be conducted only in the ordinary course, and Seller will use its best efforts to (i) preserve the organization of Seller intact, (ii) keep available for the benefit of the Purchaser the services of the Physicians and other present officers and employees of Seller and (iii) preserve for the benefit of the Purchaser the business relationships and good will of Seller and the Physicians with their patients and others having business and professional relationships with them.

(b) Seller will not, without the prior written consent of Purchaser, sell, transfer or otherwise dispose of any of the Assets except in the ordinary course of business, or enter into any agreement or make any commitment, written or oral, with regard to the Assets (except to purchase inventory and supplies in the ordinary course of business, the terms of which purchases shall be consistent with Seller's past practices).

(c) Seller will not change its authorized or issued capital stock, issue any shares of such stock, grant any rights or options to acquire such stock or undertake any direct or indirect redemption, purchase or acquisition of such stock. Shareholders will not grant any rights or options to acquire their stock in Seller or undertake any direct or indirect purchase, acquisition, or transfer his stock in Seller.

(d) Seller will maintain its inventory and supplies at a level consistent with its normal inventory and supply levels.

(e) Seller will collect its accounts receivable in a manner consistent with its past practices.

4.7 Accounts Receivable. Seller and Shareholders will assist and cooperate with Purchaser after the Closing date in collecting the Accounts Receivable.

4.8 "Tail" Insurance Coverage. All physicians shall have viable professional liability insurance policies; which policies are described in Exhibit 2.8 hereto. Seller and each Physician whose professional liability insurance policies indicate coverage on a "claims made" basis (as opposed to an "occurrence" basis) shall purchase and have in effect on or before the closing date a "tail" insurance policy written by a responsible insurance carrier qualified and authorized to do the business of insurance in the Commonwealth of Pennsylvania, covering such Seller or Physician, as the case may be, otherwise in compliance with the provisions of the Pennsylvania Health Care Services Malpractice Act, commonly known as Act III (40 P.S. Section 1301.101 et. seq.) and which "tail" policy is evidenced in Exhibit 2.8 hereto.

5. Obligations of Purchaser. Purchaser agrees as follows:

5.1 Employment Agreements. Purchaser will, on or before the date of Closing, enter into employment agreements with Physicians. The form of Professional Employment Agreement for the Shareholders is attached hereto as Exhibit 5.1.1 and the form of Professional Employment Agreement for the other physicians is attached hereto as Exhibit 5.1.2. The form of Employment Agreement for Physician's Assistants and Nurse Midwife is attached hereto as Exhibit 5.1.3. Other personnel, currently in Seller's employ will be employed

by Purchaser without Employment Agreements and will individually be credited with sick and vacation time as set forth in Exhibit 1.1(d) hereto.

5.2 Compliance with Statutes. Purchaser will duly comply with all applicable laws with which it is required to comply in order to validly complete the transactions provided for in this Agreement.

5.3 Representations and Warranties. Purchaser will not take or omit to take any action which would result in the inaccuracy at Closing of any of the representations and warranties contained in Section 3 of this Agreement.

6. Conditions of Closing as to Purchaser. The obligations of Purchaser under this Agreement are subject to the fulfillment before or at Closing of the following conditions:

6.1 Occurrence of Representations and Warranties. The representations and warranties contained in section 2 of this agreement shall be true at closing with the same effect as though made on that date.

6.2 Performance by Seller. Seller shall have performed all obligations and complied with all conditions required to be performed or complied with by seller prior to or at closing.

6.3 Certified Resolutions. Purchaser shall have received a copy of resolutions duly adopted by Shareholders and Seller's Board of Directors authorizing the execution, delivery and performance of this Agreement and all related documents.

6.4 Employment Agreements. The Physicians shall have entered into the employment agreements described in Section 5.1 above.

6.5 Opinion of Counsel for Seller. Purchaser shall have received an opinion from Mark Kropiewnicki, Esq., dated the Closing date, in the form attached hereto as Exhibit 6.5.

6.6 Conditions Unfulfilled. If any of the foregoing conditions set forth in this Section 6 are not fulfilled at Closing, Purchaser may, at its sole option, terminate this Agreement.

7. Conditions of Closing as to Seller and Shareholders. The obligations of Seller and its Shareholders under this Agreement are subject to the fulfillment before or at Closing of the following conditions:

7.1 Accuracy of Representations and Warranties. The representations and warranties contained in Section 3 of this Agreement shall be true at Closing with the same effect as though made on that date.

7.2 Performance by Purchaser. Purchaser shall have performed all obligations and complied with all conditions required to be performed or complied with or by Purchaser prior to or at Closing.

7.3 Certified Resolutions. Seller shall have received copies of Purchaser's independently audited financial statements for its two (2) most recently completed fiscal periods and a copy for resolutions duly adopted by Purchaser's board of directors authorizing the execution, delivery and performance of this Agreement and all related documents.

7.4 Opinion of Counsel for Purchaser. Seller shall have received an opinion from Jeffrey R. Waldo, Esquire, dated the Closing date, in the form attached hereto as Exhibit 7.4.

7.5 Conditions Unfulfilled. If any of the conditions set forth in this Section 7 are not fulfilled at Closing, Seller may, at its sole option, terminate this Agreement.

8. Other Rights and Obligations.

8.1 Taxes. Seller and Purchaser will pay in equal proportions all real estate transfer taxes, and all other transfer, documentary, sales and similar taxes and all registration and recording fees and costs payable in connection with the consummation of the transaction contemplated hereunder. Real estate taxes and sewer rent (if any) for the current term shall be calculated as levied and pro rated as of the date of Closing.

8.2 Expenses. Each party will pay all of its own legal, accounting, broker and other fees, costs and expenses in connection with its compliance with and performance under this Agreement and the consummation of the transaction contemplated hereunder.

8.3 Indemnification by Seller and its Shareholders. Seller and its Shareholders will be jointly and individually liable for, and will indemnify and hold harmless Purchaser against, any damage or deficiency resulting from any misrepresentation, omission, breach of warranty or nonfulfillment of any agreement on the part of Seller or any or all of its Shareholders contained in this Agreement or in any Schedule, statement or certificate furnished or to be furnished to Purchaser pursuant hereto or in connection with the transactions contemplated

hereby and any actions, judgments, costs and expenses incident to the foregoing. It is agreed that the amount of damages or deficiency under this Agreement for each Shareholder shall be individually liable or shall indemnify or hold harmless Purchaser shall not exceed that Shareholder's proportionate interest in the Purchase Price, as set forth in Exhibit 8.3 hereto. The aggregate indemnification for Seller and all shareholders shall be limited to Two Million Nine Hundred Thousand ($2,900,000) Dollars, excess of applicable insurance coverages.

In the event of the assertion of a claim as to which Purchaser may seek indemnification hereunder, Purchaser shall furnish Seller and its Shareholders timely and adequate notice of such claim. Seller and Shareholders shall cooperate with Purchaser in its defense of any such claim and, upon request of Seller or its Shareholders receive information concerning the status of such defense as they may reasonably require to monitor its progress from time to time. In the event Purchaser fails to fulfill its obligations to defend a claim hereunder, Seller or Shareholders shall be entitled to intervene in such matter, at their expense, in their name and on their behalf, as indemnitors, to protect their rights. No such intervention, however, shall result in prejudice to any right or privilege on the part of Purchaser and, if so, Purchaser may reasonably precondition such right of intervention upon the furnishing of Seller or Shareholder's bond to Purchaser for the amount of such claim pending the final resolution of the matter.

8.4 Indemnification by Purchaser. Purchaser will indemnify and hold harmless Seller and its Shareholders against any damage or deficiency resulting from any misrepresentation, omission, breach of warranty or nonfulfillment of any agreement on the part of Purchaser contained in this Agreement or in any

Exhibit, statement or certificate furnished or to be furnished to Seller and its Shareholders pursuant hereto or in connection with the transactions contemplated hereby and any actions, judgments, costs and expenses incident to the foregoing. Such indemnification shall be limited to Two Million, Nine Hundred Thousand ($2,900,000) Dollars, excess of applicable insurance coverages.

8.5 Entire Agreement. This Agreement sets forth the entire understanding of the parties with respect to the subject matter hereof. Any previous agreements or understandings between the parties regarding the subject matter hereof are merged into and superseded by this Agreement.

8.6 Nature and Survival of Representations. All statements contained in any Exhibit, certificate or other instrument delivered by or on behalf of Seller or Shareholders pursuant to this Agreement or in connection with the transactions contemplated hereby shall be deemed representations and warranties by Seller and Shareholders hereunder, and all statements contained in any certificate or other instrument delivered by or on behalf of Purchaser pursuant to this Agreement shall be deemed representations and warranties by Purchaser. All representations, warranties and agreements made by Seller, Shareholders, Physicians, or Purchaser shall survive the Closing hereunder.

8.7 Amendment and Waiver. The parties may in writing amend this Agreement in any respect, and either party, as to such party, may:

(a) extend the time for the performance of any of the obligations of the other party;

(b) waive any inaccuracies in representations or warranties by the other party;

(c) waive compliance by the other party with any of the agreements contained herein and performance of any obligations by the other party; and

(d) waive the fulfillment of any condition that is precedent to the performance by such party of any of its obligations under this Agreement.

8.8 Notices. All notices required under this Agreement must be given in writing, if to Purchaser, to:

Geisinger Clinic
Danville, PA 17822

Attention: Senior Vice President and
Administrative Director

with a required copy to:

Geisinger System Services
Department of Legal Services
Danville, PA 17822

and if to Seller, to:

Clinton Association of Physicians &
Surgeons, P.C.
P.O. Box 181
Mill Hall, PA 17751

with a required copy to:

Beck and Anders Law Associates, Inc.
400 G.S.B. Building
1 Belmont Avenue
Bala Cynwyd, PA 19004

Attention: Mark Kropiewnicki, Esq.

8.9 Parties in Interest. This Agreement may not be assigned by either party without the prior written consent of the other party. Otherwise, this Agreement shall bind and inure to the benefit of the parties hereto and their respective successors and assigns.

8.10 Counterparts. This Agreement may be executed in two or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument.

8.11 Exhibits. The Exhibits labelled 1.1(a) through 8.3 and attached hereto are hereby made a part of this Agreement as fully as if set forth in the text of this Agreement.

8.12 Governing Law. This Agreement shall be governed by Pennsylvania Law.

IN WITNESS WHEREOF, this Agreement has been executed as of the day and year first above written.

[Corporate Seal]

GEISINGER CLINIC

Attest:

S/Joan A. Ron
Asst. Secretary

By: S/Henry Hood M.D.
Henry Hood, M.D.
Its: President

[Corporate Seal]

CLINTON ASSOCIATION OF PHYSICIANS AND SURGEONS, P.C.

Attest:

Mildred W. Timmerson
Secretary

By: S/Michael R. Greenberg, M.D.
Michael R. Greenberg, M.D.
President

S/Michael R. Greenberg, M.D.
Michael R. Greenberg, M.D.

S/Barry L. Bender, M.D.
Barry L. Bender, M.D.

S/John B. Covell M.D.
John B. Covell, M.D.

S/Nicholas W. DiCuccio, M.D.
Nicholas W. DiCuccio, M.D.

S/James J. Dolan, III, M.D.
James J. Dolan, III, M.D.

S/Larry H. Lytle, M.D.
Larry H. Lytle, M.D.

David W. Thomas, J.r, M.D.
David W. Thomas, Jr., M.D.

AA112/d

EXHIBIT "4"

**IN THE SUPREME COURT OF PENNSYLVANIA**
**MIDDLE DISTRICT**

| | | |
|---|---|---|
| GEISINGER CLINIC, a Pennsylvania Non-Profit Corporation, | : | |
| Respondent, | : | No.0170 M.D. Allocatur Docket 1992 |
| v. | : | |
| NICHOLAS W. DICUCCIO, M.D., | : | |
| Petitioner. | : | |
| State of Pennsylvania | : | |
| ss | : | |
| County of Clinton | : | |

**AFFIDAVIT OF NICHOLAS W. DiCUCCIO, M.D.**

Affiant, being first duly sworn, deposes and states that:

1. I am the Petitioner in this matter and have personal knowledge of the matters herein.

2. I am a general surgeon practicing in Lock Haven, Pennsylvania, a small rural community. I also

provide primary care as a family physician.

3. There were more physicians in Lock Haven in 1973 than currently and the population has increased since 1973.

4. The population of Clinton County, in which Lock Haven is located is approximately 37,000.

5. In my practice, I have approximately 5,000 patients for whom I provide quality medical care and treatment. I see approximately 700-800 patients per month. The other general surgeon, not employed by respondent, has approximately 1,000 patients.

6. If I were prohibited from practicing medicine these five thousand patients would have to find another physician within the area.

7. The hospital in Lock Haven is a critical access hospital for rural care and was designated as such by the federal government approximately 4-5 years ago. Many of the patients that are admitted at this hospital are admitted by me. If I were prohibited from practicing,

the number of patients and income to the hospital would decrease significantly, putting the hospital in a worse financial position than it is presently.

8. If I am forced to pay the liquidated damages pursuant to the court's decision, I will be forced to close down my practice, thus, depriving the population of medical care.

Further affiant sayeth naught.

S/Nicholas W. DiCuccio, M.D.
Nicholas W. DiCuccio, M.D.

Sworn to and subscribed before me this 3rd day of December, 1993.

Steven Warner
Notary Public